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*Of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar.*

ASSISTED BY OTHER MEMBERS OF THE BAR.

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A  
CONCISE TREATISE  
ON THE  
LAW OF WILLS.

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OCTOBER, 1885.



A  
CONCISE TREATISE  
ON THE  
LAW OF WILLS.

  
H. ST. THEOBALD,  
OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW, AND  
FELLOW OF WADHAM COLLEGE, OXFORD.

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## PREFACE TO THE THIRD EDITION.

---

SINCE the last edition of this work several statutes of great importance—the Conveyancing Acts, the Married Women's Property Act, and the Settled Land Acts—have come into operation. Reference has been made to these statutes where they bear upon the subject of wills. The cases have been brought down to October, 1885. The general arrangement of the book remains unaltered.

10, OLD SQUARE, LINCOLN'S INN,  
*October, 1885.*



## PREFACE TO THE FIRST EDITION.

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THE fact that the last comprehensive treatise on the Construction of Wills is now fifteen years old, might alone be a sufficient justification of a new work on the subject. Whether it is a sufficient justification of the work now offered to the profession, experience alone can show. My object has been to produce something more compendious than Jarman's classical work—the scheme of which, involving the statement of cases at length, would now be very cumbersome, in consequence of the large accumulation of cases since the last edition of his work; and on the other hand, something more detailed and elaborate than Mr. Vaughan Hawkins' useful little book. I may say at once that without Jarman's book, my own would probably never have been written. But I have throughout used his work rather as a guide than a key to the authorities. In details I have consulted Mr. Vaughan Hawkins only incidentally, though the general scheme of his book has served in the main as the model for my own.

The value of authority in questions of testamentary

construction has so frequently been called in question of late, that it may perhaps be allowable to say a few words as to the point of view from which the present work has been written.

No two wills are alike, it is said; it is therefore useless to cite a decision upon one will as governing the interpretation of another; one man's "nonsense" affords no clue to the meaning of another man's "nonsense."

Such expressions as these are very natural, and as a protest against hard and fast rules of construction, very valuable. The stream of English law is so continuous, and the mass of reported decisions so enormous, that very few points arise in practice upon which it is not possible to cite some more or less appropriate authority. Counsel, in their anxiety to omit nothing which may support their client's interests, overlay their argument with cases, the majority of which have no more than a superficial resemblance to the point in question. It is no wonder that judges, wearied with the citation of irrelevant cases, have sometimes gone so far as to object to the citation of cases upon the construction of wills altogether. And often the argument from authority is carried further. It is contended that there is some hard and fast rule which is to be applied regardless of the words of the will and the intention of the testator. The assumption of rules of construction in this sense is an almost unmixed evil. It tends to divorce law from common sense, and to reduce it to a set of technicalities which none

but the initiated can understand. Unfortunately this point of view has not been without its influence upon English law. The most striking instance of it is perhaps the doctrine of general and particular intention. As now interpreted in the sense that technical words must have their legal effect, this doctrine would be identical with the modern doctrine that a testator must mean what he has said, were it not for the survival of the older doctrine in the so-called rule in Shelley's case. In this application of it, the rule is not simply that technical words must have their legal effect, but that technical words must have their effect notwithstanding the strongest and clearest expression of intention on the part of the testator short of an express interpretation clause, that the words were not used technically. That a devise to a man for life with remainder to his heirs should give the ancestor the immediate fee, must always remain incomprehensible to common sense, however satisfactorily the learned may be able to trace the origin of the rule in a state of things long gone by. The rule in Shelley's case is in fact a disgrace to the rational spirit of English law, and it is to be hoped that it may soon be abolished by the Legislature, as it has long since been in America.

Another and more recent instance of an attempt to establish hard and fast rules of construction may be found in the rules laid down in *Edwards v. Edwards*. In all probability Lord Romilly only intended those rules to be convenient heads for arranging decided cases, and so far as they accurately extracted the *ratio*

*decidendi* of those cases, they were very valuable. But, in course of time, they came to have a value independently of the cases upon which they were based, and there can be no doubt that the so-called fourth rule which was laid down in terms more general than decided cases justified, came to be applied to new cases *ab extra* without much consideration of the language of the particular testator. The consequence was the sacrifice of the wishes of the individual to the certainty of the law; and had not a decision of the House of Lords intervened to reduce the rule within its proper limits, there would have been another instance of language meaning one thing to a layman and a totally different thing to a lawyer.

So far then it may be said there are no rules of construction but only decided cases. A testator can only mean what he has said, and his meaning is to be gathered by a careful study of the language he has used. On the other hand, admitting all this, it does not therefore follow that the construction of a will is to be left entirely to the discretion of the individual judge, unfettered by precedent or authority, though occasional dicta of judges might be cited in support of such a position.

The principles of law applicable to the construction of wills must be the same as those applicable to other matters.

Law is no more than the expression of the meaning of the acts of men in their relations with one another, when viewed by the most enlightened common sense of the day. There is no abstract law to be applied like a

foot rule to facts; but law is the facts viewed in their natural bearings with reference to each other. It follows that, if the facts are the same, the same consequences ought to be deduced from them. The difficulty consists in discovering whether the facts are the same or not. In one sense, no doubt, the facts never are absolutely identical. There must at least be a difference of time, and this in itself, considering the continuous change in social life, is an important factor. But the question is not whether the facts are absolutely identical, but whether a fresh set of facts can be fairly distinguished from an earlier set. If not, judges have always considered themselves bound by the interpretation put upon such facts by their predecessors; and when there have been repeated adjudications upon similar sets of facts, by a process of analysis and classification, rejecting immaterial distinctions and selecting essential points of similarity, what may be called a rule of law is established. But rules of law in this sense as distinguished from rules of policy, or from rules of law established by legislative enactment, only mean that the Courts have taken a particular view of a certain set of facts, and will do so again if similar facts arise. This process is inevitably subject to a twofold danger; a strong judge will be more likely to distinguish cases, he will look upon precedent as a guide and not as a master. A judge of a less independent spirit will dwell more upon resemblances, he will be more anxious to shelter himself under authority. The inclination of the one to adapt the law to the changing conditions of life has the accompanying disadvantage of unsettling

it, while the other tends to make the law antiquated, though he leaves it certain.

No doubt in the case of wills there is this distinction. The facts here are the words employed by the testator, and since language is a much more adequate instrument for conveying subtleties of meaning than any other form of expression, the facts are of necessity exceedingly complex. It is more unlikely that undistinguishable sets of facts have already been adjudicated upon in the case of wills than in any other branch of law; but if they have been the subject of decision, a Court of co-ordinate jurisdiction is as much bound by those decisions in the cases of wills as in any other branch of law. The frequent dicta, therefore, to be found in the reports against citing cases upon the construction of wills only come to this, that it is useless to cite cases which have no application, and that in all probability the cases cited will be found to have none. Even with regard to this latter point it will not be safe to be too confident. Cases of construction are so numerous, originality even in "nonsense" is so rare, that there will nearly always be similar cases, or, at any rate, cases instructive even by their distinguishability.

The present work has been written from the point of view which I have thus endeavoured to indicate. Wherever rules of construction are spoken of in the following pages, the meaning is, that certain words have received a particular interpretation by the Courts, and that words not reasonably distinguishable will receive the same interpretation when they occur again, or, in other words, that certain rules of construction

will prevail in the absence of an intention to the contrary. The rules of construction here discussed are, in fact, no more than a collection of arguments for or against the different constructions which may suggest themselves in the interpretation of the meaning of testators.

*November, 1876.*



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# A CONCISE TREATISE ON WILLS.

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## CHAPTER I.

### BY WHAT LOCAL LAW WILLS ARE REGULATED.

A WILL, so far as it relates to immovable property, must be made in accordance with the formalities required by the law of the land where the immovable property is situated. Chap. I.  
Will of  
immovables.

Immovable property for this purpose includes leaseholds; the validity and construction, therefore, of wills so far as they affect leaseholds in England, must be governed by English law. *Freke v. Lord Carbery*, 16 Eq. 461; *In bonis Gentili*, I. R. 9 Eq. 541. Leaseholds.

Wills of personalty made in execution of powers are valid, if made in accordance with the instrument creating the power without reference to the domicile of the testator, subject of course to section 10 of the Wills Act, which enacts, that no appointment shall be valid unless executed in accordance with the Act. Will under  
power.

Thus, a will executed according to the Wills Act is a good execution of a power, though the will would be invalid according to the testator's domicile. *Tatnall v. Hankey*, 2 Moo. P. C. 342; *In bonis Alexander*, 6 Jur. N. S. 354; 29 L. J. P. 93; 1 Sw. & T. 454, n.; *In bonis Hallyburton*, 1 P. & D. 90; overruling on this point, *Crookenden v. Fuller*, 1 Sw. & T. 441, 454.

It is doubtful whether a testamentary power to appoint

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personalty can be exercised by a will valid according to the law of the testator's domicile, but not executed according to the Wills Act.

In *D'Huart v. Harkness*, 34 L. J. Ch. 311; 11 Jur. N. S. 633; 34 B. 324, it was held that such a power might be exercised by any valid will, whether executed in accordance with the Wills Act or not.

But in *In re Kirwan's Trusts*, 25 Ch. D. 373, Kay, J., was of opinion that section 10 of the Wills Act makes an appointment by will invalid, if not executed in accordance with the Act, though the will may be valid according to the law of the testator's domicile. It may, perhaps, be possible to contend that the wills rendered invalid by section 10 are those contemplated by section 9, and throughout the Act, namely, the wills of domiciled Englishmen.

By 24 & 25 Vict. c. 114, which extends only to testamentary instruments made by persons dying after the 6th August, 1861, it is enacted—

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. See *In bonis De la Saussaye*, 3 P. & D. 42; *In bonis Donaldson*, 3 P. & D. 45; *In bonis Lacroix*, 2 P. D. 94; *In bonis Gatti*, 27 W. R. 323.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland

to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. See *In bonis Gally*, 1 P. D. 438. Chap. I.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same. Change of domicile not to invalidate will.

The Act applies to British subjects only, and neither this Act nor the Naturalisation Act, 1870 (33 Vict. c. 14), enables an alien domiciled abroad at the time of making his will and of his death, to make a will in English form. *In bonis Von Buseck*, 6 P. D. 211; *S. C., Bloxam v. Favre*, 8 P. D. 101; 9 *ib.* 130.

It is doubtful whether the will of a British subject made in Scotland, where a will is not revoked by marriage, would be revoked by the subsequent acquisition of an English domicile and the marriage of the testator. *In bonis Reül*, 1 P. & D. 74.

The validity of wills of personal property, except in the case of British subjects dying after August, 1861, is governed by the law of the testator's domicile at the date of the death. *Anstruther v. Chalmer*, 2 Sim. 1; *Stanley v. Bernes*, 3 Hagg. 373; *Price v. Dewhurst*, 8 Sim. 279; 4 M. & Cr. 76; *Preston v. Melvill*, 8 Cl. & F. 1; *Craigie v. Lewin*, 3 Curt. 435; *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468; *Bremmer v. Freeman*, 10 Moo. P. C. 306; *Enohin v. Wylie*, 10 H. L. 1; see *Eames v. Hacon*, 16 Ch. D. 407. Domicile.

Legislative changes in the law of the country, where the deceased was domiciled, made after his death, though with express reference to his will, cannot be considered in deciding upon the right to have the will proved in this country. *Lynch v. Provisional Government of Paraguay*, 2 P. & D. 268.

The administration of the personal property of a deceased person, whether a British subject or not, including the construction of his will, is governed by the law of the testator's domicile at the time of his death. *Enohin v. Wylie*, 10 W. R. 467; 10 H. L. 1; see *Ewing v. Orr-Ewing*, 9 App. C. 34; *In re Hernando*; *Hernando v. Suwtell*, 27 Ch. D. 284. Domicile governs administration and construction of will.

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In matters of procedure, such as payment of interest on legacies, the Court follows its own practice. *Hamilton v. Dallas*, 38 L. T. N. S. 215.

Domicile  
independent  
of allegiance.

The question of domicile is independent of naturalisation and allegiance. *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Haldane v. Eckford*, 8 Eq. 631; *Brunel v. Brunel*, 12 Eq. 299; *Douglas v. Douglas*, 12 Eq. 617. The following cases on this point are overruled—*Moorhouse v. Lord*, 10 H. L. 272; *In re Capdevielle*, 2 H. & C. 985; *A.-G. v. Countess de Wahlstatt*, 3 H. & C. 374; *Jopp v. Wood*, 34 B. 88; 13 W. R. 481; *Maltass v. Maltass*, 1 Rob. 67.

According to English law every person has a domicile. If a domicile of choice has not been acquired, the law attributes to him a domicile, which may be called his domicile of origin.

Domicile  
of origin of  
children.

The domicile of origin of a legitimate child is that of its father, of an illegitimate child that of its mother. *Dalhousie v. Macdouall*, 7 Cl. & F. 817; *Munro v. Munro*, 7 Cl. & F. 842; *Re Patten*, 6 Jur. N. S. 151.

After the death of their father the domicile of infant children is the domicile of the mother as long as she remains a widow. *Potinger v. Wightman*, 3 Mer. 67; see *Johnston v. Beattie*, 10 Cl. & F. 42, 66.

It is unsettled whether the capacity of the widow to alter the domicile of her infant children is not lost on her second marriage. See *Dicey on Dom.*, 102, citing *Ryall v. Kennedy*, 40 N. Y. Sup. Ct. 347, where it was held that upon remarriage of the widow the domicile which infants had immediately before the mother's remarriage remained.

Of lunatic.

The domicile of a person, who is a lunatic when he attains his majority and so remains up to the time of his death, changes with that of his father in the case of a legitimate child and with that of his mother in the case of an illegitimate child, when there is no committee of the person. *Sharpe v. Crispin*, 1 P. & D. 611.

It is doubtful whether a guardian can change an infant's domicile. *Douglas v. Douglas*, 12 Eq. 617, 625.

Of married  
woman.

The domicile of a married woman at any given time is the domicile of her husband at that time. *Warrender v. War-*

*render*, 2 Cl. & F. 488; *Dalhousie v. Macdonall*, 7 Cl. & F. 817; *Whitcomb v. Whitcomb*, 2 Curt. 351; *Dolphin v. Robins*, 7 H. L. 390; *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307.

A married woman living apart from her husband under an agreement for a separation has no power to change her domicile by her own act. *Warrender v. Warrender*, 2 Cl. & F. 488. *In re Daly's Settlement*, 25 B. 456.

After a decree for a divorce the wife can select her own domicile. *Williams v. Dormer*, 2 Rob. 505.

It would seem that the same rule should apply after a judicial separation. See *Dolphin v. Robins*, 7 H. L., pp. 416, 420; *Le Sueur v. Le Sueur*, 1 P. D. 139; 2 P. D. 79.

Persons entering the military service of any state acquire the domicile of that state. *President of United States v. Drummond*, 12 W. R. 701; 33 B. 449. Military service.

But the domicile of a person domiciled within the United Kingdom, for instance in Jersey, is not changed by entering the military service of the Crown. *Re Patten*, 6 Jur. N. S. 151; *Brown v. Smith*, 15 B. 144; *Yelverton v. Yelverton*, 29 L. J. P. 34; 1 Sw. & T. 574; *Ex parte Cunningham*; *In re Mitchell*, 13 Q. B. D. 419.

Entry into the service of the East India Company formerly effected a change of domicile. *Bruce v. Bruce*, 2 B. & P. 229, n.; 6 B. P. C. 566; *Munroe v. Douglas*, 5 Mad. 379; *Forbes v. Forbes*, Kay, 341; *Craigie v. Lewin*, 3 Curt. 435. East India Company's service.

The Court does not recognise an Anglo-Chinese domicile. *In re Tootal's Trusts*, 23 Ch. D. 532. Anglo-Chinese domicile.

The domicile of origin endures until an actual change is made by which another domicile is acquired. *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307; *Ommaney v. Bingham*, cit. 5 Ves. 757; *Somerville v. Lord Somerville*, 5 Ves. 749, 786; *Moore v. Budd*, 4 Hag. 346; *Munro v. Munro*, 7 Cl. & F. 842, 876; *Countess of Dalhousie v. Macdouall*, 7 Cl. & F. 817; *A.-G. v. Dunn*, 6 M. & W. 511; *De Bonneval v. De Bonneval*, 1 Curt. 856.

A domicile of choice is acquired by a person who fixes his sole or principal residence in a country which is not his country of origin with the intention of residing there for a period not limited as to time. *King v. Foxwell*, 3 Ch. D. 518; *Drevon v.* Domicile of choice.

- Chap. I.** *Drevon*, 12 W. R. 946; *The Harmony*, 2 Rob. Ad. 322; *Bempde v. Johnstone*, 3 Ves. 198.
- China and Turkey.** Every presumption is to be made against the acquisition by an Englishman of a domicile of choice in such countries as China and Turkey, where there is a total difference of religion, customs, and habits. *The Indian Chief*, 3 C. Rob. Adm. 22, 29; *Maltass v. Maltass*, 1 Rob. Ecc. 67; *In re Tootal's Trusts*, 23 Ch. D. 532.
- Trading settlements.** Persons domiciled in trading settlements in countries like China and Turkey acquire the domicile of the country under whose protection the settlements are established. *The Indian Chief*, 3 C. Rob. Adm. 22; *In re Tootal's Trusts*, 23 Ch. D. 532.
- Disability to acquire domicile of choice.** A person may by the duties of his position or by his profession be disqualified from acquiring a domicile of choice. Thus it seems that an officer holding a commission from the Crown cannot acquire a new domicile unless he is on half-pay. *Craigie v. Lewin*, 3 Curt. 435; *Hodgson v. De Beauclerc*, 12 Moo. P. C. 285; *Cockrell v. Cockrell*, 25 L. J. Ch. 730; *Re Macreight*; *Preston v. Macreight*, 53 L. T. 147.
- Ambassador or peer.** But there is nothing in the position of an ambassador or peer of the realm to prevent the acquisition of a domicile of choice. *Heath v. Samson*, 14 B. 441; *A.-G. v. Kent*, 1 H. & C. 12; *Hamilton v. Dallas*, 1 Ch. D. 257.
- Compulsory residence.** A domicile of choice can only be acquired by choice, therefore a compulsory residence abroad as a refugee, or to avoid creditors, will not effect a change of domicile, unless followed by voluntary adoption of the new domicile. *De Bonneval v. De Bonneval*, 1 Curt. 864; *Pitt v. Pitt*, 12 W. R. 1089.
- Similarly residence abroad in the performance of a public duty, such as that of judge, military officer, or consul, does not in itself confer a foreign domicile. *A.-G. v. Rowe*, 1 H. & C. 31; *A.-G. v. Napier*, 6 Ex. 217; *Sharpe v. Crispin*, 1 P. & D. 611.
- Residence for sake of health.** A person compelled to go abroad for the sake of his health would probably not acquire a foreign domicile. See *Johnston v. Beattie*, 10 Cl. & F. 42, p. 138.
- But where a foreign country is selected as a residence in the hope or opinion that it may be better suited to the health or constitution, a domicile of choice may be acquired. *Hoskins v. Matthews*, 8 D. M. & G. 13.

Domicile of choice is a mixed question of intention and fact; Chap. I.  
there must be an intention to reside permanently in a particular country, followed by actual residence. Where the intention is clear, length of residence would be immaterial. Domicile of choice constituted by completed intention.

Where there is no direct evidence of intention, length of residence is material as showing what the intention was.

Thus a fixed intention to adopt a certain place as a domicile, followed by arrival at that place, would, it seems, at once constitute that place a domicile. *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307.

The fact of residence in a particular place will not constitute that place a domicile of choice so long as the person residing is in search of some permanent place of residence, and has not made up his mind where it shall be. *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307; *Whicker v. Hume*, 7 H. L. 124; *Re Patience*; *Patience v. Main*, 29 Ch. D. 976. *Querens quæ se conferat.*

By permanent residence must be understood residence to which no definite limit of time can be assigned. Permanent residence.

Thus residence abroad with a view to making a fortune will effect a change of domicile. *Lyall v. Paton*, 25 L. J. Ch. 746; *Allardice v. Onslow*, 33 L. J. Ch. 434.

So an intention to reside in a country as long as another person lives is in effect an intention to reside permanently. *Anderson v. Laneuville*, 9 Moo. P. C. 325.

Where a person has in fact taken up a permanent residence in a country, that country will be his domicile notwithstanding an intention to retain his domicile of origin, or some other domicile. *A.-G. v. Kent*, 1 H. & C. 12; *A.-G. v. Fitzgerald*, 3 Dr. 610; *In re Steer*, 3 H. & N. 594; *Doucet v. Geoghegan*, 26 W. R. 825; 9 Ch. D. 441. See, too, *Stanley v. Bernes*, 3 Hag. 373; *Anderson v. Laneuville*, 9 Moo. P. C. 325; *In bonis Raffenet*, 3 Sw. & T. 49; *Stevenson v. Masson*, 17 Eq. 78. Intention to return.

Where a person has two residences, the place where he usually resides with his wife and family will be considered his place of domicile. *Forbes v. Forbes*, Kay. 341; *Aitcheson v. Dixon*, 10 Eq. 589; *Platt v. A.-G. of New South Wales*, 3 App. C. 336. Two residences.

Where a domicile of choice is abandoned, the domicile of

*Revival of*

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 domicile of  
 origin.

origin is revived until a fresh domicile of choice is acquired. *The Indian Chief*, 3 Rob. Adm. 12; *In bonis Bianchi*, 3 Sw. & T. 16; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *King v. Foxwell*, 3 Ch. D. 518; overruling *Munroe v. Douglas*, 5 Mad. 379, 405, so far as inconsistent.

By 24 & 25 Vict. c. 121, where a convention has been entered into with a foreign state willing to adopt the provisions of the Act, an order in Council may direct that no British subject resident in such state shall acquire a domicile there unless he shall have been resident there for a year, and shall have made a declaration of his intention to become domiciled there; and the subjects of the foreign state are to acquire a British domicile only after the same formalities have been gone through.

## CHAPTER II.

### GENERAL CHARACTERISTICS OF TESTAMENTARY INSTRUMENTS.

A GIFT intended to be testamentary can only be effectually made by an instrument duly executed as a will. Thus, a direction to give property to a person after the donor's death, where the donor retains full control of the property in his life, is invalid. *Powell v. Hellicar*, 26 B. 261; *Fletcher v. Fletcher*, 4 Ha. 79; *Hughes v. Stubbs*, 1 Ha. 481; *Maguire v. Dodd*, 9 Ir. Ch. 452; *Farquharson v. Cave*, 2 Coll. 356; *Gough v. Findon*, 7 Ex. 48. Chap. II.  
Testamentary gift.

In the same way a deed not intended to have any effect till the settlor's death is testamentary. *Consett v. Bell*, 1 Y. & C. C. 569; *Rigden v. Vallier*, 2 Ves. Sen. 253; *Dillon v. Coppin*, 4 M. & Cr. 647; *In bonis Morgan*, 1 P. & D. 214; *Fielding v. Walshaw*, 27 W. R. 492; *In re Robson*; *Emley v. Davidson*, 30 W. R. 257. Deed to take effect after death.

A voluntary settlement, though reserving to the settlor a life interest and containing a power of revocation, is not testamentary. *Thompson v. Browne*, 3 M. & K. 32. The case of *A.-G. v. Jones*, 3 Pr. 368, is overruled; see *Majoribanks v. Hovenden*, 1 Dru. 11, 27, 29; *Sheldon v. Sheldon*, 1 Rob. 83; *Brown v. Adv.-G.*, 1 Macq. 79; see too *Hope v. Harman*, 11 Jur. 1097; *Hope v. Hope*, 10 B. 581. Voluntary settlement.

Similarly, an instrument coming into operation immediately, and of which no part is revocable, more especially if it involves anything in the nature of consideration, cannot take effect as a will. *In bonis Robinson*, 1 P. & D. 384; see *In bonis Halpin*, 1. R. 8 Eq. 567; *Thorncroft v. Lashmar*, 10 W. R. 783.

## Chap. II.

Deed in part  
testamentary.

On the other hand, if a deed is in part clearly testamentary, such part may take effect as a will, though other parts are not testamentary. *Doe d. Cross v. Cross*, 8 Q. B. 714; see *Peacock v. Monk*, 1 Ves. 127; Belt 82; *Hogg v. Lushley*, 3 Hagg. 415, note; *Bagnall v. Downing*, 2 Lee 3.

What may  
take effect as  
a will.

Any instrument executed in the manner required by the Wills Act may take effect as a will, provided the intention was that it should not operate till after the death of the donor.

Thus, the following instruments, being properly executed, have been allowed to take effect as testamentary dispositions:—

Orders on a savings bank, and on a banker. *In bonis Marsden*, 1 Sw. & T. 542; *Jones v. Nicolay*, 2 Rob. 288.

A cheque to take effect after death. *Bartholomew v. Henley*, 3 Phillim. 317.

A letter. *Denny v. Barton*, 2 Phillim. 575; *In bonis Mundy*, 2 Sw. & T. 119; 9 W. R. 171.

A paper containing wishes and a dying request. *In bonis Lowry*, 5 N. of C. 619; *In bonis Mundy*, 2 Sw. & T. 119.

A deed of gift to take effect at death. *Habergham v. Vincent*, 2 Ves. J. 204; 4 B. C. C. 355; *Thorold v. Thorold*, 1 Phillim. 1; *Shergold v. Shergold*, cit. ib. 10; *In bonis Montgomery*, 5 N. of C. 99; *In bonis Morgan*, 1 P. & D. 214; *Fielding v. Walshaw*, 27 W. R. 492.

An instrument to take effect two years "after my wife's death if she survives me." *In bonis News*, 7 Jur. N. S. 688.

Where there is nothing to show that an instrument has reference to the death of the person executing it, it cannot have effect as a will. *Glynn v. Oglander*, 2 Hagg. 428; *King's Proctor v. Daines*, 3 Hagg. 218; *Shingler v. Pemberton*, 4 Hagg. 359; *Majoribanks v. Hovenden*, 1 Dru. 11.

Evidence of  
testamentary  
intention.

But evidence is admissible to show that a deed or other instrument of gift, which on the face of it is not testamentary, was not intended to operate till the death of the person executing it. *Cock v. Cooke*, 1 P. & D. 241; *Robertson v. Smith*, 2 P. & D. 43; *In bonis Coles*, 2 P. & D. 362; *In bonis Webb*, 3 Sw. & T. 482; 10 Jur. N. S. 709; *In bonis English*, 3 Sw. & T. 586.

And, conversely, evidence is admissible to show that an

instrument on the face of it testamentary was not intended to be a will. *Nicholls v. N.*, 2 Phillim. 183; *Lister v. Smith*, 3 Sw. & T. 282; *Trevelyan v. T.*, 1 Phillim. 149; *In bonis Nosworthy*, 11 Jur. N. S. 570.

An instrument, expressing merely an intention of instructing a solicitor to prepare a testamentary instrument with a view to make a particular legacy, will not take effect as a testamentary instrument, where there is no extraneous evidence of testamentary intention. *Coventry v. Williams*, 3 Curt. 787. Intention to make will.

A duly executed instrument described as instructions for a will may have effect as a will if it appears that it was intended to take effect in the absence of a more formal instrument. *Bone v. Spear*, 1 Phillim. 345; *Torre v. Castle*, 1 Curt. 303; 2 Moore P. C. 133; *Barwick v. Mullings*, 2 Hagg. 225; *Hattatt v. Hattatt*, 4 Hagg. 211; *Whyte v. Pollok*, 7 App. C. 400. Instructions for will.

Since the Wills Act, section 10, an appointment by will insufficiently executed cannot be aided. *In re Kirwan's Trusts*, 25 Ch. D. 373. Will under power.

A will may be made contingent upon the happening of an event, so that if the event does not happen the will has no effect. *Roberts v. Roberts*, 2 Sw. & T. 337; 31 L. J. P. 46. Contingent will.

Thus, if the testator makes his will conditional upon his death during a particular period which he survives, the will does not take effect. *In bonis Porter*, 2 P. & D. 22; *In bonis Robinson*, 2 P. & D. 171; *In bonis Lindsay*, 2 P. & D. 459. See *In bonis Thorne*, 4 Sw. & T. 36; 34 L. J. P. 131.

On the other hand, if the possibility of death during a particular period is given as the reason or motive why the testator makes his will, it is not contingent upon the happening of the death during that period. *In bonis Dobson*, 1 P. & D. 88; *In bonis Martin*, 1 P. & D. 380; *In bonis Mayd*, 6 P. D. 17.

A testator may give to a third person the option of deciding whether a testamentary instrument executed by him shall take effect as a will or not. *In bonis Smith*, 1 P. & D. 717.

A will is in all cases revocable, even though the testator may declare it to be irrevocable. *Vynior's Case*, 8 Co. 82a. Will revocable.

**Chap. II.****Covenant not to revoke.**

A covenant not to revoke a will is a binding covenant, for breach of which an action will lie, though it cannot be specifically enforced. *Robinson v. Ommannney*, 23 Ch. D. 285.

**Joint wills.**

Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor. *Hobson v. Blackburn*, 1 Add. 274; *In bonis Stracey*, Dea. & S. 6; *In bonis Lovegrove*, 2 Sw. & T. 453; *In bonis Fletcher*, 11 L. R. Ir. 359.

A joint will may be made to take effect after the death of both testators; and if the joint will is not a disposition by each testator of his own property, but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor. *In bonis Raine*, 1 Sw. & T. 144.

In ordinary cases a joint will is looked upon as the will of each testator, and may be proved on the death of one. *In bonis Stracey*, 1 Jur. N. S. 1197; Dea. & S. 6; *In bonis Miskelly*, I. R. 4 Eq. 62, where *In bonis Raine* is disapproved.

**Mutual wills.**

It seems that two persons may agree to make mutual wills, which remain revocable during the joint lives by either with notice to the other, but become irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other. *Dufour v. Pereira*, 1 Dick. 419; 2 Harg. Jur. Arg. 272; 2 Harg. Jur. Ex. 101; see 3 Ves. 416; *Lord Walpole v. Lord Orford*, 3 Ves. 401; *Denyssen v. Mostert*, L. R. 4 P. C. 236; *Dias v. De Lievera*, 5 App. C. 123, P. C.

**Promise to make a will.**

For the effect of a promise to leave a person property by will, see *Maddison v. Alderson*, 8 App. C. 467; *Humphreys v. Green*, 10 Q. B. D. 148.

## CHAPTER III.

## TESTAMENTARY CAPACITY.

A TESTATOR must, at the time of making his will, have an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim to be the objects of his bounty, and the manner in which it is to be distributed. *Harwood v. Baker*, 3 Moo. P. C. 282; *Longford v. Purdon*, 1 L. R. Ir. 75.

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General  
capacity.

The question of sanity is a question of fact, and there is no presumption that a testator is sane till the contrary is shown. *Sutton v. Sadler*, 5 W. R. 880; 3 C. B. N. S. 87; *Symes v. Green*, 1 Sw. & T. 401; *Cleare v. Cleare*, 1 P. & D. 655.

Where a testator is subject to delusions with regard to persons who would be the natural objects of his testamentary bounty, his will made while he is under the influence of such delusions is invalid. *Dew v. Clark*, 3 Add. 79; 5 Russ. 163; *Waring v. Waring*, 6 Moo. P. C. 341; *Smith v. Telbitt*, 1 P. & D. 398; *Boughton v. Knight*, 3 P. & D. 64.

Where a testator is subject to delusions, which leave the general power of understanding unaffected and are wholly unconnected with his testamentary dispositions, such delusions do not affect his capacity to make a will. *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Smee v. Smee*, 5 P. D. 84; see *Jenkins v. Morris*, 14 Ch. D. 674.

A will made by a testator after he has been insane must be shown to have been made after his recovery or in a lucid interval. *Groom v. Thomas*, 2 Hagg. 433; *A.-G. v. Parnther*, 3 B. C. C. 443; *Hall v. Warren*, 9 Ves. 611; *Waring v. Waring*, 6 Moo. P. C. 341.

**Chap. III.**      Upon the question whether a will was made during a  
**Lucid interval.**      lucid interval, the rational character of the will, where it is prepared by the testator without assistance, is evidence to show that it was made in a lucid interval. *Cartwright v. Cartwright*, 1 Phillim. 90, 100; *White v. Driver*, 1 Phillim. 88; *Brogden v. Brown*, 2 Add. 445; *Ayrey v. Hill*, 2 Add. 210.

Every person of sound mind and not under some special disability may make a will.

**Infants.**      A will made by a person under twenty-one (unless he is a soldier in actual military service, or a mariner or seaman at sea) is invalid. 1 Vict. c. 26, s. 7; Sugd. R. P. Stat. 330.

**Married Women's Property Act, 1882.**      Under the Married Women's Property Act, 1882, section 1 (1), a married woman may dispose by will, of any real or personal property as her separate property, as if she were a *feme sole*.

**Appointment of executors.**      Under this Act it has been held that if a married woman makes a will under a power and appoints executors, probate is not to be limited to the property subject to the power, the effect of the Act being to give her all the powers of a *feme sole*, including the power to appoint an executor. *In re Jevers*, 13 L. R. Ir. 1.

**Powers of married women before the Act.**      Before the Married Women's Property Act, 1882, a married woman had no power to make a will except in the following cases :—

1. **Might continue representation to an estate.**      A married woman, who was an executrix, could make a will and appoint an executor for the purpose of continuing the representation to the original testator. *Scammell v. Wilkinson*, 2 East 552; *Birkett v. Vandercom*, 3 Hag. 750; *In bonis Richards*, 1 P. & D. 156.

2. **Will under power.**      A married woman might dispose by will of the legal estate and the equitable interest in lands and of personal estate in exercise of a power. *Driver v. Thompson*, 4 Taunt. 294; *Willock v. Noble*, L. R. 7 H. L. 580.

A will made by a woman during coverture in exercise of a power given to her by the settlement made on her first marriage, might be exercised during that or any subsequent coverture. *Burnett v. Mann*, 1 Ves. Sen. 156; *Hawksley v. Barrow*, 1 P. & D. 147.

In the case of realty, where a married woman having Chap. III.  
 appointed by will under a power survived her husband and took  
 a conveyance to herself, the conveyance has been held to Whether  
power  
destroyed by  
conveyance.  
 execute the power and to revoke the will. *Lawrence v. Wallis*,  
 2 B. C. C. 319—the decision may have been influenced by the  
 old doctrine, that a will of lands is revoked by an alteration of  
 the estate of the testator in the lands, but the judgment does  
 not refer to this doctrine.

In the case of personalty, however, it has been held that  
 where a married woman having made a will under a power  
 survived her husband and took an assignment of the fund over  
 which the power extended from the trustees, the will was  
 nevertheless valid. *Dingwell v. Askew*, 1 Cox. 427; *Clough v.*  
*Clough*, 3 M. & K. 296. These cases are probably open to  
 reconsideration.

A married woman could dispose by will of personal estate and 3. Will of  
separate  
estate.  
 of the beneficial interest in real estate when settled to her  
 separate use. *Taylor v. Meads*, 10 Jur. N. S. 166; 34 L. J. Ch.  
 203; 4 D. J. & S. 597; *Pride v. Bubb*, 7 Ch. 64; *Hall v.*  
*Waterhouse*, 10 Jur. N. S. 361; 5 Giff. 64; see *Dye v. Dye*, 13  
 Q. B. D. 147.

Though the married woman had no separate estate at the After-acquired  
separate  
estate.  
 date of the will, the will took effect as regards after-acquired  
 separate estate. *Charlemont v. Spencer*, 11 L. R. Ir. 347, 490.

The legal estate not being affected by the separate use could  
 not be disposed of by will.

The accumulations of property belonging to a married woman Savings.  
 for her separate use, made during coverture whether by herself  
 or a trustee for her, are separate estate; accumulations made  
 after the husband's death are not separate estate, and would,  
 therefore, not pass by a will made during coverture. *In re*  
*Wilson*; *Menteith v. Campbell*, 26 W. R. 848. *In bonis Tharp*,  
 3 P. D. 76.

In an Irish case it has been said, that a married woman had Separate use  
to arise on  
contingency.  
 no power of disposition over property given to her for her  
 separate use, where the separate use was only to arise in certain  
 events. See *Bestall v. Bunbury*, 13 Ir. Ch. 318, following  
*Mara v. Manning*, 8 Ir. Eq. 218. Both these cases were,

Chap. III. however, cases of contract and not of wills. See too, *Flower v. Buller*, 15 Ch. D. 665; *Pike v. FitzGibbon*, 17 Ch. D. 454.

Where a married woman had a power to appoint if she should not survive her husband, and an absolute interest to her separate use if she survived him, a will made during coverture, expressed to be in virtue of the power and of every other power enabling her, took effect upon the separate estate if she survived her husband. *Bishop v. Wall*, 3 Ch. D. 194.

4. Will *ex assensu viri*.

A married woman might, with her husband's assent, dispose by will of personal property not settled to her separate use and over which she had no power of appointment. *Willock v. Noble*, L. R. 8 Ch. 778; 7 H. L. 580.

It was necessary that the assent of the husband should be given to the particular will with knowledge of its contents.

It was said in *Noble v. Willock*, 8 Ch., p. 790, that the husband might withdraw his assent until he had either assented to probate or had acted upon the will.

However, in *Maas v. Sheffield*, 1 Rob. 364, it was held that a husband having given his assent in writing to his wife's will after her death, but before probate, could not revoke it. The case is probably open to reconsideration.

Where a husband after his wife's death assented to probate of her will, but died before probate was granted, the will was held entitled to probate. *In bonis Cooper*, 6 P. D. 34.

Assent revoked by death.

The will of a married woman requiring her husband's assent becomes invalid by his death in her lifetime, whether he has assented to it or not. *Price v. Parker*, 15 Sim. 198; *Trimmell v. Fell*, 16 B. 537; *Willock v. Noble*, L. R. 7 H. L. 580; *In re Wilson*; *Menteith v. Campbell*, 26 W. R. 848.

The law upon this point is not altered by the Married Women's Property Act, 1882. *In re Price*; *Stafford v. Stafford*, 28 Ch. D. 709.

5. Wife of exile and felon.

The wife of a person banished for life by Act of Parliament (a), or attainted (b), and the wife of an alien enemy (c), and of a convict transported for life, though he has received a conditional pardon (d), is for testamentary purposes a *feme sole* as regards property vested in her after her husband's disability has been incurred. *Countess of Portland v. Prodgers*, 2 Vern. 104 (a); *Newsome v. Bowyer*, 3 P. W. 37 (b); *Deerly v. Mazarine*, 1 Salk.

116 (c); *Re Martin*, 2 Rob. 405; 15 Jur. 686; *In bonis Coward*, 11 Jur. N. S. 569; 24 L. J. P. 120 (d). Chap. III.

The wife of a convict transported for years would seem to be in the same position notwithstanding *Coombs v. Queen's Proctor*, 2 Rob. 547, which was not decided on the ground that the sentence was only for years and is inconsistent with *Re Harrington Trusts*, 29 Beav. 24; *Atlee v. Hook*, 23 L. J. Ch. 776.

A married woman who had obtained a protection order could make a will as if she were a *feme sole*, and the order related back to the date of the desertion. *In bonis Elliott*, 2 P. & D. 274. 6. Protection order.

But the husband might oppose grant of probate on the ground that the protection order was obtained by fraud. *Mudge v. Adams*, 6 P. D. 54.

By the Naturalization Act, 1870 (33 Vict. c. 14), which is not retrospective, real and personal property may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject. See *Sharp v. St. Sauveur*, 7 Ch. 343; *De Geer v. Stone*, 22 Ch. D. 243. Aliens.

There appears never to have been any testamentary incapacity as such, affecting traitors, felons or suicides. They were not incapable of making wills, they were only incapable of disposing of such property as was forfeited for their offence. Traitors, felons, and suicides.

Thus a *felo de se* could make a will of realty which was not forfeited, and could also appoint an executor by will. *Norris v. Chambres*, 7 Jur. N. S. 59; *In bonis Bailey*, 2 Sw. & T. 156.

By 33 & 34 Vict. c. 23 forfeiture and escheat for treason and felony is abolished, and section 8 enacts that every convict shall be incapable during the time while he shall be subject to the operation of the Act of alienating or charging any property, or of making any contract. See *Ex parte Graves*; *In re Harris*, 19 Ch. D. 1. Forfeiture abolished.

Sections 9—17 contain provisions for the administration of the convict's property by administrators, and section 18 provides that the property shall be invested and accumulated for the benefit of the convict and his heirs and legal personal represen-

Chap. III.     tatives, and shall revest in the convict upon his ceasing to be subject to the operation of the Act, or his heirs or legal personal representatives.

              The Act appears to leave the testamentary power of a convict untouched, and it would seem therefore that a convict may now dispose of his property by will.

Outlawry.     By 42 & 43 Vict. c. 59, s. 3, outlawry in any civil proceeding is abolished.

## CHAPTER IV.

## REQUISITES FOR A VALID WILL.

No will can be valid of which the testator does not know and Chap. IV.  
 approve the contents. *Barry v. Butlin*, 2 Moo. P. C. 480; *In bonis Duane*, 8 Jur. N. S. 752; 31 L. J. P. 173; *Sutton v. Sadler*, 3 C. B. N. S. 87; 26 L. J. C. P. 284; *Hastilow v. Stobie*, 1 P. & D. 64; *Cleare v. Cleare*, *ib.* 655; *In bonis Hunt*, 23 W. R. 553; 3 P. & D. 250; overruling *Cunliffe v. Cross*, 3 Sw. & T. 37; 32 L. J. P. 68. Knowledge of contents.

A testator cannot, therefore, delegate his testamentary power Delegation of  
testamentary  
power.  
 to another person; that is to say, he cannot adopt and execute a will made for him without knowing its contents. *Hastilow v. Stobie*, 1 P. & D. 64; *Cleare v. Cleare*, *ib.* 655. See *ante*, p. 11.

But a will prepared in accordance with the testator's instructions is valid, though at the time of execution the testator remembers only that he has given instructions and believes the will to be in accordance with them. *Parker v. Felgate*, 8 P. D. 171.

Where a person writes or prepares a will under which he Legatee  
preparing will  
must prove  
knowledge.  
 takes a benefit, it lies upon him to show that the will or the particular clause under which he takes a benefit, expresses the true will of the testator. The evidence of the beneficiary alone is insufficient. *Paske v. Ollatt*, 2 Phillm. 323; *Ingram v. Wyatt*, 1 Hagg. 388; *Billinghurst v. Vickers*, 1 Phillim. 187; *Baker v. Batt*, 2 Moo. P. C. 317; *Scoular v. Plowright*, 5 W. R. 99; 10 Moo. P. C. 440; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Hegarty v. King*, 5 L. R. Ir. 249; 7 *ib.* 18.

But the influence of a person standing in a fiduciary relation Fiduciary  
relation.

**Chap. IV.** to the testator may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and the burden of proof of undue influence lies upon those who assert it. *Hindson v. Wetherill*, 6 D. M. & G. 301; *Walker v. Smith*, 29 B. 394; *Parfitt v. Lawless*, 2 P. & D. 462.

The rules therefore applicable in the case of gifts *inter vivos* to persons standing in a fiduciary relation to the donor do not apply to wills. In the case of gifts *inter vivos*, such persons have to show not only that the donor intended to give, but that his intention was not influenced by the donee, a burden of proof which in most cases it is practically impossible to discharge, at any rate so long as the fiduciary relation subsists.

Undue  
influence.

To establish a case of undue influence, it must be shown that fraud or coercion has been practised on the testator in relation to the will itself, not merely in relation to other matters or transactions. *Boyse v. Rossborough*, 6 H. L. 2; *Hall v. Hall*, 1 P. & D. 481. See *Longford v. Purdon*, 1 L. R. Ir. 75.

If a testator is prevented by threats from altering his will, the Court of Probate may, if the case is proved, declare the persons exercising the coercion trustees of the benefits they take under the will. *Betts v. Doughty*, 5 P. D. 26.

**Will read over.** A will which has been read over to the testator, or the contents of which have been brought to his notice before execution, must, in the absence of fraud or coercion, be presumed to have been approved by him. *Guardhouse v. Blackburn*, 1 P. & D. 109; *Goodacre v. Smith*, *ib.* 359; *Atter v. Atkinson*, *ib.* 665; *Rhodes v. Rhodes*, 7 App. C. 192.

Fraud and  
mistake.

Clauses introduced into a will by fraud, accident or mistake, without the knowledge of the testator, will be struck out of the will, unless perhaps the sense of the remaining words would be altered thereby. *In bonis Wray*, 1 R. 10 Eq. 267; *In bonis Duane*, 2 Sw. & T. 590; 31 L. J. P. 173; *In bonis Oswald*, 3 P. & D. 162; *Morrell v. Morrell*, 7 P. D. 68; *Rhodes v. Rhodes*, 7 App. C. 192.

But where a testator has executed a will with knowledge of the contents, nothing can be added or omitted from it after his death on the ground of mistake. *In bonis Davy*, 1 Sw. & T.

262; *Guardhouse v. Blackburn*, 1 P. & D. 109; *Harter v. Harter*, 3 P. & D. 11. Chap. IV.

Where a residuary legatee prepares the will and is directed to give further legacies which he purposely omits, and at the time when the will is read over and executed the further legacies are not present to the mind of the testator as the residuary legatee knows, the will will nevertheless be admitted to probate. *Mitchell v. Gard*, 3 Sw. & T. 75.

The remedy in such a case would appear to be to have the residuary legatee declared a trustee so far as regards the legacies omitted. As to whether such a declaration must be obtained in the Probate Division at the time when the will is proved, see *post*, p. 65.

The Court has, it seems, power to direct a passage containing a gross libel to be omitted from the probate copy of the will, though it will not exercise the power merely on the ground that the charge is offensive and untrue. *In bonis Wartnaby*, 1 Rob. 423; and *Marsh v. Marsh*, 1 Sw. & T. 528, 536, passages omitted. *Curtis v. Curtis*, 3 Add. 33; and *In bonis Honeywood*, 2 P. & D. 251, omission refused. Omission of scandalous passages.

By the Wills Act (1 Vict. c. 26), section 8, it is enacted that no will shall be valid unless it shall be in writing and executed in manner thereafter mentioned. Wills Act, s. 8.

The requirements as to execution are as follows:—in the first place the will must be signed at the foot or end thereof by the testator, or by some other person in his presence or by his direction. 1. Signature by testator.

The signature of the testator must be intended as an act of execution of the will. A signature to each page of the will, where the last page is left unsigned, is not *prima facie* a sufficient execution. *Sweetland v. Sweetland*, 4 Sw. & T. 6; *Burke v. Moore*, I. R. 9 Eq. 609; *In bonis Maddock*, 3 P. & D. 169. Intention to execute.

The mark of the testator is a sufficient signature, whether he can write or not. *Baker v. Denning*, 8 A. & E. 94; *Wilson v. Beddard*, 12 Sim. 28; *In bonis Bryce*, 2 Curt. 325; *In bonis Amiss*, 2 Rob. 116; *In bonis Douce*, 2 Sw. & T. 593; *In bonis Clarke*, 1 Sw. & T. 22. Mark.

- Chap. IV.** A stamped name is sufficient. *Jenkyns v. Gaisford*, 3 Sw. & T. 93; 11 W. R. 854.
- Assumed name.** Signature in an assumed name is sufficient. *In bonis Glover*, 5 N. of C. 553; *In bonis Ridding*, 2 Rob. 339; *In bonis Clarke*, 1 Sw. & T. 22; *In bonis Douce*, 2 ib. 593.
- Seal.** A seal is not sufficient. *Smith v. Evans*, 1 Wils. 313; *Grayson v. Atkinson*, 2 Ves. Sen. 459; *Ellis v. Smith*, 1 Ves. J. 13, 15; *Wright v. Wakeford*, 17 Ves. 459. The case of *Lemayne v. Stanley*, 3 Lev. 1; 1 Freem. 538, is overruled.
- But a seal with the testator's initials, and acknowledged as his hand and seal, is sufficient. *In bonis Emerson*, 9 L. R. Ir. 443.
- Dry pen.** Passing a dry pen over a written signature is not enough. *Casement v. Fulton*, 5 Moo. P. C. 130; *Playne v. Scriven*, 1 Rob. 772; see *Kevil v. Lynch*, 1 R. 9 Eq. 249.
- Signature by agent.** Another person, though he may be also an attesting witness, may by the testator's direction sign the testator's name, or impress a stamp with the testator's name engraved on it, or sign his own name on behalf of the testator. *Jenkyns v. Gaisford*, 11 W. R. 854; 3 Sw. & T. 93; *Clarke's Case*, 2 Curt. 329; *In bonis Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Rob. 262.
- Connection of signature with will.** The sheets of which a will consists need not be severally signed by the testator nor be connected together, but they must be in the same room where the execution took place. *Gregory v. Queen's Proctor*, 4 N. of C. 620; *Marsh v. Marsh*, 1 Sw. & T. 528; *Bond v. Seawell*, 3 Burr. 1773.
- But the signature must be physically connected with the will. *In bonis Horsford*, 3 P. & D. 211; *In bonis M'Key*, 1 R. 11 Eq. 220.
- Position of signature.** By the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), section 1, it is provided that a will shall be valid if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (a), and no will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot, or end of the will,

or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation (b), either with or without a blank space intervening, or shall follow (c) or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause, or paragraph, or disposing part of the will shall be written (d) above the signature, or by the circumstance that there shall appear to be sufficient space (e) on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature. *In bonis Jones*, 34 L. J. P. 41; 4 Sw. & T. 1; *In bonis Williams*, 1 P. & D. 4; *In bonis Coombs*, 1 P. & D. 302 (a); *In bonis Walker*, 2 Sw. & T. 354; *In bonis Casmore*, 1 P. & D. 653; *In bonis Pearn*, 1 P. D. 70 (b); *In bonis Puddephatt*, 2 P. & D. 97; *In bonis Horsford*, 3 P. & D. 211 (c); *In bonis Wright*, 34 L. J. P. 104; 4 Sw. & T. 35; *Hunt v. Hunt*, 1 P. & D. 209; *In bonis Archer*, 2 P. & D. 252; *In bonis Wotton*, 3 P. & D. 159 (d); *In bonis Williams*, 1 P. & D. 4 (e).

The same section enacts that no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. See *In bonis Greator*, 2 Jur. N. S. 1172; *In bonis Dallow*, 1 P. & D. 189; *In bonis Ainsworth*, 2 P. & D. 151; *In bonis Dearle*, 39 L. T. N. S. 93; *In bonis Arthur*, 2 P. & D. 273.

If the signature of the testator intended to be in execution of the will is followed by words intended to form part of the will, effect may be given to the part of the will preceding the signature, if that part in effect constitutes the whole of the dispositive portion of the will. *Keating v. Brooks*, 2 Curt. 421; 4 N. of C. 260; *In bonis Davis*, 3 Curt. 748; *In bonis Cotton*, 6 N. of C. 307; 1 Rob. 658; see *In bonis Topham*, 7 N. of C. 272; 2 Rob. 189; *Sweetland v. Sweetland*, 4 Sw. & T. 6 (in which case the question was whether there was a due

Words under  
signature.

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execution of any part of the will); *In bonis Wray*, 31 W. R. 476.

The same rule applies if the words following the signature contain unimportant bequests or appoint executors only. *In bonis Standley*, 7 N. of C. 69; 1 Rob. 755; *In bonis Amis*, 7 N. of C. 274; 2 Rob. 116.

2. Signature must be witnessed.

In the second place, the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

The signature of the testator must be written or acknowledged by the testator in the presence of both witnesses together, before either of them attest and subscribe the will. *In bonis Allen*, 2 Curt. 331; *In bonis Olding*, *ib.* 865; *In bonis Byrd*, 3 *ib.* 117; *Moore v. King*, *ib.* 243; *Pennant v. Kingscote*, *ib.* 643; *In bonis Summers*, 2 Rob. 295; *Cooper v. Bockett*, 3 Curt. 648; 4 Moo. P. C. 419; *Hindmarsh v. Charlton*, 1 Sw. & T. 433; 8 H. L. 160.

Will not void for incompetency of witness.

The Wills Act (1 Vict. c. 26), s. 14, provides that if any person who shall attest the execution of a will shall, at the time of the execution thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not, on that account, be invalid.

Section 15 enacts in effect that a will attested by a beneficiary under the will is valid, though the gift to the attesting witness is void.

Section 16 enacts that, in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Section 17 enacts that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will or a witness to prove the validity or invalidity thereof.

a. Signature made in presence of witnesses.

Where the testator writes something on the will in the presence of the witnesses summoned to attest the will, it will

be presumed that he wrote his signature, though the witnesses may not see the signature and may not know that the document is his will. *Smith v. Smith*, 1 P. & D. 143.

If the will bears a proper attestation clause, it may be upheld, though neither of the attesting witnesses can positively say that the testator signed in their presence. *Wright v. Sanderson*, 9 P. D. 149.

The acknowledgment may be by gestures. *In bonis Davies* 2 Rob. 337; *In bonis Owston*, 10 W. R. 410.

b. Acknowledgment of signature already made.

Acknowledgment by a third person in the hearing of the testator, and acquiesced in by him, is an acknowledgment by the testator. *In bonis Jones*, Dea. & Sw. 3; *In bonis Bosanquet*, 2 Rob. 577; *Faulds v. Jackson*, 6 N. of C., supp. 12; *Inglesant v. Inglesant*, 3 P. & D. 172; *In bonis Bishop*, 30 W. R. 567.

It is clear that if the will is acknowledged to be the testator's will, and the witnesses see the signature of the testator, that is sufficient. *In bonis Dinmore*, 2 Rob. 641; *In bonis Philpot*, 3 N. of C. 2.

Will acknowledged; signature seen.

There is no sufficient acknowledgment, if the signature of the testator is covered up, so that the attesting witnesses do not see it. *Hudson v. Parker*, 1 Rob. 14; *In bonis Gunstan*; *Blake v. Blake*, 7 P. D. 102, overruling *Gwillim v. Gwillim*, 3 Sw. & T. 200; 29 L. J. Prob. 31; *Beckett v. Howe*, 2 P. & D. 1.

Will acknowledged; signature not seen.

It seems there may be a sufficient acknowledgment, if the testator's signature might have been seen by the witnesses, if they had looked, though they may swear that they did not in fact see it. *In bonis Gunstan*; *Blake v. Blake*, 7 P. D. 102; see *Kelly v. Keatinge*, 1 R. 5 Eq. 175; *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Cooper v. Bockett*, 4 Moo. P. C. 419; *Blake v. Knight*, 3 Curt. 547; *In bonis Huckvale*, 1 P. & D. 375; *In bonis Pearn*, 1 P. D. 71.

A request to sign a paper not declared to be a will, when the witnesses see the signature of testator, though it is not acknowledged by the testator as his signature, is sufficient. *Keigwin v. Keigwin*, 3 Curt. 607; *Gaze v. Gaze*, 3 Curt. 451; *In bonis Ashmore*, 3 Curt. 756; *In bonis Thomson*, 4 N. of C. 643; *Faulds v. Jackson*, 6 N. of C. suppl. 1; *Leech v. Bates*, 6 N. of C. 704; *Inglesant v. Inglesant*, 3 P. & D. 172; see, however, *In bonis Arthur*, 2 P. & D. 273.

Signature seen; will not acknowledged.

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Signature not  
seen; will not  
acknowledged.

But a mere request to witnesses to attest an instrument, the nature of which is not explained to them, and the signature to which they do not see, is not sufficient. *In bonis Ashton*, 5 N. of C. 548; *In bonis Rawlins*, 2 Curt. 326; *In bonis Hammond*, 3 Sw. & T. 90; *In bonis Harrison*, 2 Curt. 863; *In bonis Pearson*, 33 L. J. P. 177; *Ilott v. Genge*, 3 Curt. 160; 4 Moo. P. C. 265; *Hudson v. Parker*, 1 Rob. 14; *In bonis Trinder*, 3 N. of C. 275; *Shaw v. Neville*, 1 Jur. N. S. 408; *In bonis Swinford*, 1 P. & D. 630; *Pearson v. Pearson*, 2 P. & D. 451; *Fischer v. Popham*, 3 P. & D. 246.

When the testator's will is signed by some other person by his direction, the signature must be acknowledged by the testator in presence of two witnesses; it is not sufficient that the witnesses see the signature written if they are not present when the testator directs the signature to be made, and the will is not acknowledged as a will. *Burke v. Moore* I. R. 9 Eq. 609.

3. Signature  
by witnesses.

In the third place, such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation is necessary.

Witnesses  
need not sign  
in each other's  
presence.

The witnesses must subscribe in the presence of the testator, but they need not subscribe in the presence of each other. *White v. British Museum*, 6 Bing. 310; *Faulds v. Jackson*, 6 N. of C. sup. 1; *In bonis Webb*, 1 Jur. N. S. 1096; 2 *ib.*, 309; *Sullivan v. Sullivan*, 3 L. R. Ir. 299; see *Casement v. Fulton*, 5 Moo. P. C. 14.

Presence of  
the testator.

The witnesses will be considered to have subscribed in the presence of the testator if, under the circumstances, the testator might have seen them if he had chosen to look, though he may not have seen them. *Shires v. Glascock*, 2 Salk. 688; *Davy v. Smith*, 3 Salk. 395; *Todd v. Winchelsea*, M. & Malk. 12; 1 C. & P. 488; *Casson v. Dade*, 1 B. C. C. 99; *Doe v. Manifold*, 1 M. & S. 249; *Winchelsea v. Wauchope*, 3 Russ. 441; *In bonis Newman*, 1 Curt. 914; *In bonis Ellis*, 2 *ib.*, 395; *Newton v. Clarke*, 2 *ib.* 320; *In bonis Colman*, 3 *ib.* 118; *Tribe v. Tribe*, 7 N. of C. 132; 1 Rob. 775; *Norton v. Bazett*, Dea. & Sw. 259; 2 Jur. N. S. 766; 3 Jur. N. S. 1084; *In bonis Trinmell*, 11 Jur. N. S. 248; *In bonis Piercy*, 1 Rob. 278; *Jenner v. Finch*, 5 P. D. 106.

The signatures of the witnesses need not be in any particular part of the will, if it appears that they were intended to attest the operative signature of the testator. *In bonis Davis*, 3 Curt. 748; *In bonis Chamney*, 1 Rob. 757; *Roberts v. Phillips*, 4 E. & B. 450; *In bonis Wilson*, 1 P. & D. 269; *In bonis Pearse*, 1 P. & D. 382; *In bonis Braddock*, 1 P. D. 433.

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Position of signatures.

But the signatures, if not on the same paper as the will, must be on a paper physically connected with it. *In bonis West*, 12 W. R. 89; *In bonis Saunders*, 31 L. J. P. 53; *Cook v. Lambert*, 32 L. J. P. 93; 3 Sw. & T. 46; *In bonis Gausden*, 2 Sw. & T. 362; *In bonis M'Key* 1 R. 11 Eq. 220; *In bonis Braddock*, 1 P. D. 433.

Signatures must be connected with will.

Where the testator signs the will, and the witnesses sign a duplicate, the will is not sufficiently attested. *In bonis Hatton*, 6 P. D. 204.

The witnesses must attest the signature, which is intended as an execution of the will; and where there are several signatures, the attestation of any but that intended as an execution of the will is invalid to give effect to the will or any part of it. *In bonis Martin*, 6 N. of C. 694; 1 Rob. 712; *Ewen v. Franklin*, Deane 7; 1 Jur. N. S. 1220; *Sweetland v. Sweetland*, 4 Sw. & T. 6; 34 L. J. P. 42; 13 W. R. 504; *Phipps v. Hale*, 3 P. & D. 166; *In bonis Dilkes*, 3 P. & D. 164.

Witnesses must attest operative signature.

The attesting witnesses must subscribe with the intention, that the subscriptions made should be a complete attestation of the will, and evidence is admissible to show whether such was the intention or not. *In bonis Wilson*, 1 P. & D. 269; *In bonis Sharman*, 1 P. & D. 661; *Griffiths v. Griffiths*, 2 P. & D. 300; *In bonis Murphy*, 1 R. 8 Eq. 300.

Intention to attest.

Adding an address to, or correcting a signature already made, or writing a Christian name when the witness is unable to complete his signature, is insufficient. *In bonis Trevanion*, 2 Rob. 315; 14 Jur. 919; *Hindmarsh v. Charlton*, 1 Sw. & T. 433; 8 H. L. 160; *In bonis Maddock*, 3 P. & D. 169; *M'Conville v. M'Creesh*, 3 L. R. Ir. 73.

So a witness writing the name of a second witness opposite the mark of the latter cannot be said to subscribe. *In bonis Eynon*, 3 P. & D. 92.

Chap. IV.Form of  
signature.

A signature made without any intention of attesting will be excluded from probate. *In bonis Sharman*, 1 P. & D. 661; *In bonis Murphy*, 1 R. 8 Eq. 300.

Witnesses need not sign by name; initials, or a description, or a mark, are sufficient. *In bonis Christian*, 2 Rob. 110; 7 N. of C. 265; *In bonis Martin*, 6 N. of C. 694; *In bonis Sperling*, 3 Sw. & T. 272; 12 W. R. 354; *In bonis Amis*, 2 Rob. 116; *In bonis Ashmore*, 3 Curt. 756.

But a seal is insufficient. *In bonis Byrd*, 3 Curt. 117.

One witness cannot sign for another. *In bonis White*, 2 N. of C. 461; *In bonis Middleton*, 33 L. J. P. 16; *Re Duggins*, 39 L. J. P. 34.

Nor can a third person sign for a witness. *In bonis Cope*, 2 Rob. 335; *Pryor v. Pryor*, 29 L. J. P. 114.

But a witness or a third person may guide the hand of the second witness, or may subscribe for the witness if the witness holds the top of the pen while the signature is being made. *Harrison v. Elvin*, 3 Q. B. 117; 2 G. & D. 769; *In bonis Frith*, 4 Jur. N. S. 288; 27 L. J. P. 6; *In bonis Lewis*, 31 L. J. P. 153; 7 Jur. N. S. 688; see *In bonis Kilcher*, 6 N. of C. 15.

The papers found at the testator's death to compose his will must, in the absence of proof to the contrary, be presumed to be the will executed by him. *Gregory v. Queen's Proctor*, 4 N. of C. 620; *Marsh v. Marsh*, 1 Sw. & T. 528; *Rees v. Rees*, 3 P. & D. 84.

## CHAPTER V.

## ALTERATIONS, INTERLINEATIONS, AND ERASURES.

It is immaterial that the will contains blank spaces or even a blank page. *Corneby v. Gibbons*, 1 Rob. 705; *In bonis Rice*, I. R. 5 Eq. 176; *In bonis Wotton*, 3 P. & D. 159. Chap. V.  
Blank spaces.

Oral and written declarations of a testator made before or after the execution of the will are admissible in evidence for the purpose of showing what were the constituent parts of the will at the time of execution. *Gould v. Lakes*, 6 P. D. 1.

Where a will contains obliterations, additions, or other alterations, evidence must, if possible, be produced to show when they were made. *In bonis Hindmarch*, 1 P. & D. 307; *In bonis Duffy*, I. R. 5 Eq. 506; *Moore v. Moore*, I R. 6 Eq. 166. Evidence  
when altera-  
tions made.

For this purpose declarations of the testator with regard to his testamentary intentions made before the date of the will are admissible. *Doe v. Palmer*, 16 Q. B. 747; *In bonis Sykes*, 3 P. & D. 26; *Dench v. Dench*, 2 P. D. 60.

The fact that a date earlier than the date of the will is annexed to alterations is not alone sufficient to show that they were made before execution. *In bonis Adamson*, 3 P. & D. 253.

Alterations made in ink before execution will be presumed to be final. *Gann v. Gregory*, 3 D. M. & G. 780; *Ibbott v. Bell*, 35 B. 395. Presumption  
as to altera-  
tions.

Alterations made before execution in pencil, the will being written in ink, are *prima facie* deliberative, and the original writing will have effect. *Hawkes v. Hawkes*, 1 Hagg. 322; *Edward v. Astley*, *ib.* 490; *Ravenscroft v. Hunter*, 2 *ib.* 68; Deliberative  
alterations.

Chap. V. *Parkin v. Bainbridge*, 3 Phillim. 321; *Lavender v. Adams*, 1 Add. 403; *Bateman v. Pennington* 3 Moo. P. C. 223; *Francis v. Groves*, 5 H. 39; *In bonis Hall*, 2 P. & D. 256; *In bonis Adams*, *ib.* 367. See *In bonis Bellamy*, 14 W. R. 501.

Presumption  
as to date of  
alteration.

Alterations and additions made in a will complete without them must be presumed, in the absence of evidence, to have been made after the execution of the will or any subsequent codicil. *Cooper v. Bockett*, 4 N. of C. 685; 4 Moo. P. C. 419; *Simmons v. Rudall*, 1 S. N. S. 115; *Greville v. Tylee*, 7 Moo. P. C. 320; *Gann v. Gregory*, 3 D. M. & G. 780; *Doe v. Palmer*, 16 Q. B. 747; *Williams v. Ashton*, 1 J. & H. 115; *Christmas v. Whynates*, 3 Sw. & T. 81; *In bonis Sykes*, 3 P. & D. 26.

Alterations and additions made in a will which would be incomplete without them, must be presumed to have been made before execution. *In bonis Cadge*, 1 P. & D. 543; *Birch v. Birch*, 1 Rob. 675; 6 N. of C. 581; *In bonis Swinden*, 2 Rob. 192; *Greville v. Tylee*, 7 Moo. P. C. 320; *In bonis Birt*, 2 P. & D. 214; *In bonis Adams*, *ib.* 367; *In bonis King*, 23 W. R. 552. See, however, *In bonis White*, 30 L. J. P. 55.

Wills Act,  
s. 21.

The Wills Act (1 Vict. c. 26), s. 21, enacts that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

An alteration opposite which the testator and two witnesses have set their initials in the margin is sufficiently executed under this section. *In bonis Blewitt*, 49 L. J. P. 31; 5 P. D. 116; see, too, *In bonis Treeby*, 3 P. & D. 242; *In bonis Shearn*, 50 L. J. P. 15.

A sentence commenced on the second page and carried over to the third was admitted to probate, though the testator and witnesses had initialed only the second page. *In bonis Wilkinson*, 6 P. D. 100.

Where the original is completely obliterated and not ascertainable, the will must be considered blank, so far as the obliteration, interlineation or other alteration is concerned. *In bonis Ibbetson*, 2 Curt. 337; *Townley v. Watson*, 5 Curt. 761; *In bonis James*, 1 Sw. & T. 238.

The Court will only endeavour to discover the original by the use of glasses or similar means, and not by the use of chemicals, or removal of any substance from the will. *In bonis Beavan*, 2 Curt. 369; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6. Eq. 569. See *Lushington v. Onslow*, 6 N. of C. 183.

It appears to be clear that no external evidence would be admitted to show what the original words were, except in a case of dependent relative revocation (see *post*, p. 35). *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569. See *Townley v. Watson*, 3 Curt. 761.

The decision of the Probate Division upon a question of interlineation will be adopted upon a question relating to a devise of realty under the same will. *In re Cruttenden; Davey v. Lansdell*, 30 W. R. 57.

## CHAPTER VI.

## REVOCATION.

## Chap. VI.

Will to be  
revoked by  
marriage.

SECTION 18 of the Wills Act enacts that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

A will, though made in contemplation of marriage, is revoked by marriage. *In bonis Cadwold*, 1 Sw. & T. 34; *Marston v. Doe d. Fox*, 8 A. & E. 14; *Israel v. Rodon*, 2 Moo. P. C. 51.

Will under  
power.

A will made in exercise of a power is not revoked by marriage where the heir, executor, or administrator, or statutory next of kin, would not in all events take in default of appointment. *In bonis Fenwick*, 1 P. & D. 319; *In bonis Worthington*, 20 W. R. 260.

Nor is such a will revoked by marriage if the persons taking in default of appointment, though they may in fact be the heirs or statutory next of kin of the donee of the power, do not take in that capacity under the instrument creating the power.

Thus the will is not revoked if the gift in default of appointment is to children of the testator, or to next of kin simply instead of statutory next of kin. *In bonis Fitzroy*, 1 Sw. & T. 133; *In bonis McVicar*, 1 P. & D. 671.

Where the limitation of real estate in default of appointment is to the donee, her heirs or assigns, the will is revoked by marriage. *Vaughan v. Vanderstegen*, 2 Dr. 165, 168.

By the Wills Act (1 Vict. c. 26), s. 19, it is enacted that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances. Chap. VI.

Section 20 enacts that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." No will to be revoked by presumption.  
No will to be revoked but by another will or codicil, or by destruction.

A statement in the attestation clause of a codicil that a previous codicil is revoked does not revoke the codicil. *In bonis Atkinson*, 8 P. D. 165.

Revocation while the testator is of unsound mind is ineffectual, though he may subsequently recover. *Borlase v. Borlase*, 4 N. of C. 106; *Brunt v. Brunt*, 3 P. & D. 37. Revocation while insane invalid.

A will left in the possession of a testator who subsequently becomes insane, and revoked by him, must be shown to have been revoked while he was of sound mind. *Harris v. Berrall*, 1 Sw. & T. 153; *Sprigge v. Sprigge*, 1 P. & D. 608.

Revocation is in all cases a question of intention, and if the act done, though in itself sufficient to revoke a testamentary instrument, can be shown to have been done for a purpose other than revocation, it will not revoke the instrument. Act of destruction not done *animus revocandi*

Thus destruction of a will on the erroneous supposition that it is invalid (a), or that it has been revoked or become useless (b), or that another instrument is valid (c), will not effect a revocation. *Giles v. Warren*, 2 P. & D. 401 (a); *Scott v. Scott*, 1 Sw. & T. 258; *Clarkson v. Clarkson*, 2 Sw. & T. 497; 31 L. J. P. 143; *In bonis Middleton*, 3 Sw. & T. 583; 10 Jur. N. S. 1109 (b); *Hyde v. Hyde*, 1 Eq. Ab. 409; *Onions v. Tyrer*, 1 P. Wms. 345; *Perrott v. Perrott*, 14 East. 423; *Dancer v. Crabb*, 3 P. & D. 98 (c).

Some of the cases above cited have been called cases of dependent relative revocation. They are really cases in which there was no *animus revocandi* whatever. The instruments

**Chap. VI.**

were destroyed, not with a view to revoke them, but because the testator thought they had been revoked.

In the same way the destruction of a codicil which has revived a revoked will, will not revoke the will if it appears that the codicil was destroyed on the supposition that the will would still stand. *James v. Shrimpton*, 1 P. D. 431.

So, too, an act of destruction done merely for the purpose of making a fair copy of the will, or to improve the handwriting, has no revocatory effect. *In bonis Kennett*, 2 N. R. 461; *In bonis Applebee*, 1 Hag. 144; *In bonis Tozer*, 2 N. of C. 11.

Dependent  
relative  
revocation.

A revocation made with a view of making or reviving some other disposition will only take effect if such other disposition is effectually made or revived. *Onions v. Tyrer*, 1 P. Wms. 345; 2 Vern. 742; Prec. Ch. 459; 1 Eq. Ab. 408; *Ex parte Ilchester*, 7 Ves. 348, 372; *Lord Thynne v. Stanhope*, 1 Add. 52.

But to bring the case within this doctrine it must appear that the testator considered the substitution of some valid disposition as part of the act of revocation at the time when the act was done.

The mere revocation of a will, followed by a subsequent ineffectual disposition, will not set up the original will if the two acts are not so connected, that it can be said the substitution of an effectual disposition was the condition of the revocation of the original will. *In bonis Mitcheson*, 32 L. J. P. 202; *In bonis Weston*, 1 P. & D. 633; *In bonis Gentry*, 3 P. & D. 80.

The point in these cases is not, that a revoked will is set up again, if a subsequent disposition is ineffectual, but that the original will is not itself intended to be revoked, unless or until an effectual disposition of the property is made. See *Powell v. Powell*, 1 P. & D. 209; *In bonis Weston*, 1 P. & D. 633; *Eckersley v. Platt*, 1 P. & D. 281.

In cases of revocation the intention of the testator may always be proved by evidence.

Will revoked  
to make fresh  
will.

Thus, if a will is shown to have been cancelled for the purpose of making a fresh will, the original will is not revoked if no fresh will is made. *In bonis De Bode*, 5 N. of C. 189; *In bonis Eeles*, 2 Sw. & T. 600.

Nor, under similar circumstances, is the old will revoked if

the fresh will, though made, is not effectual. *Hyde v. Mason*, Chap. VI.  
 Vin. Abr. Devise, R. 2, pl. 17; Com. 451; 1 Lee, 423, note (a);  
*Dancer v. Crabb*, 3 P. & D. 98.

Similarly, a will cancelled in order to set up a prior will, To set up prior will.  
 which cannot be so set up, is not thereby revoked. *Powell v.*  
*Powell*, 1 P. & D. 209; see *Dickinson v. Swatman*, 4 Sw. & T.  
 205; *Eckersley v. Plutt*, 1 P. & D. 281; *In bonis Weston*, 1 P.  
 & D. 633.

Perhaps where a will is cancelled upon the execution of another invalid instrument, which differs from the cancelled will only in matters of detail, such as the persons appointed trustees, the fact that the dispositions in the two documents are the same would, even in the absence of express evidence of intention, be sufficient to show that the prior will was only intended to be revoked if the second instrument was effectual. See *Onions v. Tyrer*, 1 P. Wms. 345; *Short v. Smith*, 4 East. 419; *In bonis Middleton*, 3 Sw. & T. 583.

Upon the same principle, when the amount of a bequest is obliterated after the execution of the will, and a different, even Obliteration of part of legacy.  
 though it may be a smaller, amount is written over or interlineated, the substituted bequest, being incapable of taking effect, the original bequest remains, the inference being that it was the testator's intention to revoke the original bequest only if the substituted bequest was effectually made. *Brooke v. Kent*, 3 Moo. P. C. 334, overruling *In bonis Brooke*, 2 Curt. 343; *Soar v. Dolman*, 3 Curt. 121, overruling S. C. *in nom. In bonis Rippin*, 2 Curt. 332; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, L. R. 6 Eq. 569; *Sturton v. Whellock*, 31 W. R. 382; see *Kirke v. Kirke*, 4 Russ. 435; *Locke v. James*, 11 M. & W. 901; *Winson v. Pratt*, 2 B. & B. 650. The case of *In bonis Livock*, 1 Curt. 906, is overruled.

In such a case evidence is admissible to show what the original legacy was, and if necessary the Court will employ chemical means to ascertain it. *In bonis Horsford*, *supra*—see *ante*, p. 31.

If there is an erasure simply, without any substitution or Erase without interlineation.  
 interlineation, the doctrine does not apply, even though the erasure may be of part of a legacy—as, for instance, where

**Chap. VI.** a legacy of one hundred and fifty pounds is given, and the words "and fifty" are erased. *In bonis Ibbetson*, 2 Curt. 337; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, 1. R. 6 Eq. 569.

The distinction between a case where the words "one hundred and fifty" are obliterated and the word "fifty" is written over them, and a case where the words "one hundred and" are obliterated, leaving the word "fifty" is somewhat thin.

Erasure of  
name of  
executor.

Upon similar principles, when the name of an executor has been obliterated and another executor substituted after the execution of the will, the name of the original executor will be restored, if it can be shown by external evidence what the name was. The presumption that the testator intended to appoint some executor or other is a strong one. *In bonis Parr*, 29 L. J. P. 70; 6 Jur. N. S. 56; *In bonis Harris*, 1 Sw. & T. 536; 29 L. J. P. 79.

Erasure of  
name of  
legatee.

It is clear that, where the name of a legatee is obliterated, and that of another legatee substituted after execution, and there is no further evidence of intention, no case of dependent relative revocation arises. Under such circumstances, however, a case of dependent relative revocation may be raised by proper evidence.

Thus, if it appears from external evidence that a gift has been made to a person only on the supposition by the testator that another person was incapable of taking, and after the execution of the will the name of the first person has been obliterated and the name of the second substituted, the original legatee takes on the ground that he was intended to take in the event of the substituted legatee being incapable of taking. *In bonis McCabe*, 3 P. & D. 94.

Distinction  
between cases  
of probate  
and cases of  
construction.

The cases on the doctrine of dependent relative revocation so far discussed have been cases in the Probate Court, where evidence of testamentary intention is always admissible.

Precisely the same doctrine applies in a Court of Construction, the only difference being that the intention to revoke a former gift only if a subsequent gift is effectually made must appear on the face of the instrument. No external evidence to prove the dependency of the two gifts is admissible.

Thus, if a legacy is given by will to A, and by a codicil the legacy to A is revoked, and the same legacy is given to B, who predeceases the testator, or for other reasons is incapable of taking, the legacy to A is nevertheless revoked. There is in such a case nothing to show that the legacy to A was only to be revoked if the legacy to B was effectually made, or in other words, no case of dependent relative revocation is made out. *French's Case*, Rolle's Ab. Devise, O. 4; *Tupper v. Tupper*, 1 K. & J. 665; *Nevill v. Boddam*, 25 B. 554; *Quinn v. Butler*, 6 Eq. 225; *Baker v. Story*, 23 W. R. 147.

It has been said that the doctrine of dependent relative revocation has no application, where the second disposition fails not from the infirmity of the instrument, but from the incapacity of the devisee. 1 Jarm. 156, 3rd ed.; Wms. Exors. 153. Incapacity of legatee.

But this is a mere distinction of fact and not of principle. It may even be doubted whether it reconciles the cases in fact. See *Quinn v. Butler*, 6 Eq. 225. The true theory seems to be, that the doctrine of dependent relative revocation applies equally where the second legatee is incapacitated from taking, provided the case can be brought within the doctrine, or in other words, provided it can be shown that the original legacy was intended to be revoked only in the event of the second taking effect. The mere fact that a legacy is revoked and a different legacy to a different legatee substituted, affords no argument either in the Court of Probate or in a Court of Construction that the capacity of the second legatee to take was the condition of the revocation of the earlier legacy.

A subsequent will is no revocation of a former one if the contents of the later will are unknown, or if, though it is known that the later will differed from the former one, it is unknown in what respects it differed. *Hitchins v. Basset*, 3 Mod. 204; 2 Salk. 592; Show. P. C. 146; *Dickinson v. Stidolph*, 11 C. B. N. S. 341, 357; *Hellier v. Hellier*, 9 P. D. 237. Subsequent will—contents unknown.

Where there are several testamentary instruments which are not inconsistent, they will together be considered the will of the testator so far as they are not inconsistent. *In bonis Budd*, 3 Sw. & T. 196; *Berks v. Berks*, 4 Sw. & T. 23; *Lemage v. Good-* Several testamentary instruments.

Chap. VI. *ban*, 1 P. & D. 57; *In bonis Fenwick*, *ib.* 319; *In bonis Griffith*, 2 *ib.* 457; *In bonis Patchell*, 3 *ib.* 153; *In bonis Hartley*, 50 L. J. P. 1.

The fact that both instruments appoint a person sole executor will not cause the later instrument to revoke the former. *In bonis Leese*, 2 Sw. & T. 442; *In bonis Graham*, 3 *ib.* 69; *Geaves v. Price*, 3 *ib.* 71.

**Inconsistent  
instruments.**

Where a subsequent will disposes or shows an intention of disposing of all the testator's property, it will be held to have revoked a prior will *in toto*, whether the dispositions contained in the subsequent will are different from the earlier dispositions or not. *Henfrey v. Henfrey*, 2 Curt. 468; 4 Moo. P. C. 29; *Pepper v. Pepper*, 1 R. 5 Eq. 85; *Plenty v. West*, 2 Phillim. 264; *Cottrell v. Cottrell*, 2 P. & D. 397; *Dempsey v. Lawson*, 2 P. D. 98; *O'Leary v. Douglass*, 3 L. R. Ir. 323; *In re M'Farlane*, 13 L. R. Ir. 264.

Where there are two testamentary instruments, and from the nature of the documents and the surrounding circumstances it is doubtful whether the later was intended to be in substitution for the earlier one, evidence is admissible to show the intention. *Jenner v. Finch*, 49 L. J. Ch. 25; 5 P. D. 106.

**Last will.**

The description of a testamentary document as the last will of the testator will not alone have the effect of revoking prior testamentary papers. *Cutto v. Gilbert*, 9 Moo. P. C. 131; *Stoddart v. Grant*, 1 Macq. 171; *Lemage v. Goodban*, 1 P. & D. 57; *Leslie v. Leslie*, 1 R. 6 Eq. 332; *Freeman v. Freeman*, Kay, 479; 5 D. M. & G. 704; *In bonis De la Saussaye*, 3 P. & D. 42; *In re O'Connor*, 13 L. R. Ir. 406.

**Clause of  
revocation.**

A will containing a clause revoking all former wills revokes a will made in execution of a power. *Sotheran v. Denning*, 20 Ch. D. 99; see *In bonis Tenney*, 45 L. T. 78.

But in several cases where a will was made in exercise of a power, a second will made in exercise of another power and containing a general clause of revocation, has been held not to revoke the first will. *In bonis Meredith*, 29 L. J. P. 155; *In bonis Merritt*, 1 Sw. & T. 112; 7 W. R. 543; *In bonis Joys*, 30 L. J. P. 169; 4 Sw. & T. 214; see *Richardson v. Barry*, 3 Hag. 249.

A will under a power is revoked if a subsequent will contains an express reference to the power, or disposes of the property subject to the power, though it may not dispose of all of it. *Richardson v. Barry*, 3 Hag. 249; *In bonis Eustace*, 3 P. & D. 183; *Harvey v. Harvey*, 23 W. R. 478. Chap. VI.

A codicil reviving a revoked will thereby revokes a will intermediate in date between the first revoked will and the codicil, and inconsistent with the first will. *Lord Walpole v. Orford*, 3 Ves. 402; *In bonis Reynolds*, 3 P. & D. 35. Codicil  
reviving  
revoked will.

Where will A is revoked by will B and destroyed, and there is a codicil, purporting to revive will A but ineffectual to do so, because will A is not in existence, the question arises, whether will B is revoked. Codicil  
reviving de-  
stroyed will.

The cases on this subject are complicated. The rule appears to be, that if there are no dispositions in the codicil inconsistent with will B, the mere fact, that the codicil is described as a codicil to will A, does not revoke will B. *Rogers v. Goodenough*, 2 Sw. & T. 342.

On the other hand, if the codicil contains dispositions inconsistent with will B, or expressly confirms will A, it seems will B is revoked and the codicil alone is admissible to probate. *Hale v. Tokelove*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. 118.

The destruction or cancellation of a will whereby it is revoked will not revoke a codicil. *In bonis Dutton*, 3 Sw. & T. 66; *In bonis Ellice*, 12 W. R. 353; *In bonis Halliwell*, 4 N. of C. 400; *In bonis Coulthard*, 11 Jur. N. S. 184; *Tagart v. Hooper*, 1 Curt. 289; *Black v. Jobling*, 1 P. & D. 685; *In bonis Savage*, 2 *ib.* 78; *In bonis Turner*, *ib.* 403. Revocation of  
codicil.

But if will and codicil are on the same piece of paper, cutting off the signature to the will will revoke the codicil, if the intention was to revoke both. *In bonis Bleckley*, 8 P. D. 169.

Where a will is revoked by a subsequent codicil, it would be a question of construction, whether intermediate codicils are also revoked. Effect of  
codicil re-  
voking will  
on earlier  
codicils.

If the revoking codicil refers to the will by date, or distinguishes between the will and subsequent codicils, the latter are not revoked. *Farrer v. St. Catherine's Coll.*, 16 Eq. 19; see *Bunny v. Bunny*, 3 B. 109; *Pratt v. Pratt*, 14 Sim. 129.

**Chap. VI.** The re-execution of a will, containing a clause revoking all former testamentary instruments, will not revoke a codicil to the will, at any rate if the object of the re-execution appears to have been to give effect to alterations in the will, or if there is evidence to show that revocation of the codicil was not intended. *Wade v. Nazer*, 1 Rob. 627; *Upfill v. Marshall*, 3 Curt. 636; *In bonis Rawlins*, 48 L. J. P. 64; 28 W. R. 139.

Re-execution of will containing clause of revocation.

Codicil confirming will.

A codicil making an alteration in a will, referred to as a will of a particular date, and confirming that will, does not revoke intermediate codicils. *Smith v. Cunningham*, 1 Add. 448; *Crosbie v. Mucedoual*, 4 Ves. 610; *In bonis De la Saussaye*, 3 P. & D. 42; *Green v. Tribe*, 9 Ch. D. 231.

A codicil confirming the will except as altered by an earlier codicil referred to by its date does not revoke an intermediate codicil by which alterations have been made in the will. *Follett v. Pettman*, 23 Ch. D. 337; *In re Vyryan*; *Whitfield v. Vyryan*, W. N. 1883, 47.

Testamentary letter.

A letter, duly signed and attested, requesting a third person to destroy the testator's will, is sufficient to revoke it. *In bonis Durance*, 2 P. & D. 406.

Revocation by succession of acts.

Where a testator intends to revoke his will by the performance of a succession of acts, some only of which he actually performs, the will is not revoked, though the acts performed might alone be sufficient to revoke it if the testator intended to do no more. *Doe v. Perkes*, 3 B. & A. 489; *In bonis Colberg*, 2 Curt. 832; *Elms v. Elms*, 1 Sw. & T. 155. See, too, *Winson v. Pratt*, 2 B. & B. 650; *Locke v. James*, 11 M. & W. 901; *Kirke v. Kirke*, 4 Russ. 435; *Doe v. Harris*, 6 A. & E. 209; 2 N. & P. 615.

Acts done must be those named in statute.

But though a testator may have done everything which he considered necessary to revoke his will, the will is not revoked if he has not adopted one or other of the modes of revocation pointed out in section 20. (See *ante*, p. 33.)

Thus, writing across a will that it is revoked, and throwing it into the waste paper basket, will not revoke the will if it is in fact preserved. *Cheese v. Lovejoy*, 2 P. D. 251. See *Andrew v. Motley*, 12 C. B. N. S. 514.

The revocatory acts, if done by a third person by the testator's direction, must also be done in his presence. Chap. VI.

Revocation by  
third person.

Thus, a will burnt by the testator's order but not in his presence is not revoked. *In bonis Dadds*, Dea. & Sw. 290.

Striking through the will or the signature of the testator with a pen is not sufficient to revoke his will. *Stephens v. Taprell*, Striking  
through  
signature. 2 Curt. 458; *In bonis Rose*, 4 N. of C. 101; *Benson v. Benson*, 2 P. & D. 172; *Re Brewster*, 6 Jur. N. S. 56.

A will found in the possession of the testator with the signature cut off will, in the absence of evidence to the contrary, be presumed to be revoked. *In bonis Lewis*, 1 Sw. & T. 31; *Walker v. Armstrong*, 21 B. 305; 4 W. R. 770; *In bonis Gullan*, 1 Sw. & T. 23; *Hobbs v. Knight*, 1 Curt. 768; *Bell v. Fothergill*, 2 P. & D. 148. Tearing off  
signature.

And this is the case, though the piece cut off may be carefully preserved with the will. *In bonis Simpson*, 5 Jur. N. S. 1366; *In re White*, 3 L. R. Ir. 413; *Bell v. Fothergill*, 2 P. & D. 148; *Magnesi v. Hazelton*, 44 L. T. 586.

Obliterating or tearing off the names of the attesting witnesses is sufficient to revoke the will. *In bonis James*, 7 Jur. Tearing off  
names of  
witnesses. N. S. 52; *Abraham v. Joseph*, 5 Jur. N. S. 179; *Evans v. Dallow*, 31 L. J. P. 128.

Tearing off the name of one of the attesting witnesses would, no doubt, be sufficient to revoke the will. But the will is not revoked, if the name is carefully preserved with the will, and there is other evidence from the mode in which the piece cut off has been treated to rebut the presumption of revocation. *In bonis Wheeler*, 49 L. J. P. 29.

The destruction of signatures not necessary to the validity of the will, but recited in the attestation clause to have been made, is sufficient to revoke the will. *Price v. Price*, 3 H. & N. 341; *Lumbell v. Lumbell*, 3 Hagg. 568; *Davies v. Davies*, 1 Ca. t. Lee 444; *Williams v. Tyley*, Johns. 530; *In bonis Harris*, 3 Sw. & T. 485. Tearing off  
signatures  
recited to  
have been  
made.

Where portions of the will not necessary to its validity as a testamentary instrument are destroyed, the question is whether the portion destroyed is so important as to raise the presumption that the rest cannot have been intended to stand without it, or Destruction of  
portions of  
will.

Chap. VI whether it is unimportant and independent of the rest of the will. *Clarke v. Scripps*, 2 Rob. 563; *In re White*, 3 L. R. Ir. 413.

Thus, the destruction of a clause at the commencement of a will, or cutting out various legacies, will not revoke the rest. *In bonis Woodward*, 2 P. & D. 206; *In bonis Nelson*, 1 R. 6 Eq. 569.

On the other hand, where the middle pages only of a will were preserved, the whole was held to be revoked, though each page had been signed and attested. *In bonis Gullan*, 1 Sw. & T. 23; *Gullan v. Grove*, 26 B. 64; where the facts are badly stated.

A gift by deed of property disposed of by a prior will is not a revocation of the will, though it may make the will ineffectual. *Ford v. Da Pontes*, 30 B. 572.

Will in  
duplicate.

Where a will is executed in duplicate, one of which the testator retains while he deposits the other in the custody of another person, the destruction of the duplicate in the testator's possession revokes the whole. *Seymour's Case*, Com. Rep. 453; 1 P. W. 346; 2 Vern. 742; *Onions v. Tyrer*, 1 P. W. 346; *Burtenshaw v. Gilbert*, Cowp. 49; *Boughey v. Moreton*, 2 Cas. t. Lee, 532; 3 Hag. 191; *Rickards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hag. 266; see *Payne v. Trappes*, 1 Rob. 583.

Will not  
found.

A will or codicil left in the testator's possession and not forthcoming at his death must, in the absence of evidence to the contrary, be presumed to have been revoked. *Padmore v. Whatton*, 3 Sw. & T. 449; *In bonis Shaw*, 1 Sw. & T. 62; *Brown v. Brown*, 8 E. & B. 876; *Eckersley v. Platt*, 1 P. & D. 281; *Sugden v. Lord St. Leonards*, 1 P. D. 154.

But the contents of the will and the declarations of the testator down to his death are admissible in evidence for the purposes of rebutting this presumption. *Patten v. Poultien*, 6 W. R. 458; 1 Sw. & T. 55; *Battyl v. Lyles*, 22 Jur. 718; *Finch v. Finch*, 1 P. & D. 370; *Whiteley v. King*, 17 C. B. N. S. 756; *Sugden v. Lord St. Leonards*, 1 P. D. 154.

Evidence of  
contents of  
lost will.

Where a will, shown not to have been revoked, cannot be found at the testator's death, evidence is admissible to prove its

contents. *Brown v. Brown*, 8 E. & B. 876; *In bonis Barber*, Chap. VI.  
1 P. & D. 267; *Burls v. Burls*, *ib.* 472.

And for this purpose the declarations, written or oral, of the testator, made as well after as before the execution of the will, may be admitted. *Doe d. Shalcross v. Palmer*, 16 Q. B. 747; *Finch v. Finch*, 1 P. & D. 371; *Johnson v. Lyford*, *ib.* 546; *Sugden v. Lord St. Leonards*, 1 P. D. 154: see *Keen v. Keen*, 3 P. & D. 105. The case of *Quick v. Quick*, 3 Sw. & T. 442, is overruled.

The contents of the will may be established by the evidence of a single interested witness whose veracity and competency are unimpeached. *Sugden v. Lord St. Leonards*, 1 P. D. 154.

Where it is impossible to ascertain the whole contents of the will, effect will be given to such portions as can be ascertained. *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Dickinson v. Stidolph*, 11 C. B. N. S. 341.

## CHAPTER VII.

## WILLS OF SOLDIERS AND SEAMEN.

- Chap. VII.** THE Statute of Frauds (29 Car. II. c. 3), s. 23, provides that, notwithstanding that Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate as he or they might have done before the making of the Act.
- Soldiers and sailors excepted from Statute of Frauds as regards wills of movables. Exception continued by Wills Act.** The Wills Act (1 Vict. c. 26), s. 11, enacts that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act.
- The Navy and Marines (Wills) Act, 1865. Short title.** By the Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), it is provided:—
1. This Act may be cited as "The Navy and Marines (Wills) Act, 1865."
  2. In this Act—  
The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral.  
The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of Her Majesty's vessels, or otherwise belonging to Her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.
  3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize
- Will made before entry ineffectual as to wages, &c.**

money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty. Chap. VII

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney. Will invalid if combined with power of attorney.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine, or when he has ceased so to serve, shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:— Regulations for wills of seamen, &c., as to wages, &c.

- (1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea:
- (2.) Where the will is made on board one of Her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to Her Majesty's naval or marine or military force:
- (3.) Where the will is made elsewhere than on board one of Her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public:

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the

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testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

As to wills  
made by  
prisoners of  
war.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war, shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

- (1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to Her Majesty's naval or marine or military force, or a warrant or subordinate officer of Her Majesty's Navy, or the agent of a naval hospital, or a notary public:
- (2.) If the will is made according to the forms required by the law of the place where it is made:
- (3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea,

Payment  
under will  
not in con-  
formity with  
Act.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

Commence-  
ment of Act.

8. This Act shall commence on such day, not later than the first day of January, one thousand eight hundred and sixty-six, as Her Majesty in Council thinks fit to direct; nevertheless

Her Majesty in Council may, if it seems fit, with reference to Chap. VII.  
any places out of the United Kingdom, direct that this Act do  
not commence there, respectively, until a time after that day,  
and with respect to every such place the time so appointed  
shall be deemed the time of commencement of this Act.

9. Every Order in Council under this Act shall be published Publication of  
Orders in  
Council.  
in the *London Gazette*, and shall be laid before both Houses of  
Parliament within thirty days after the making thereof, if Par-  
liament is then sitting, and if not, then within thirty days after  
the next meeting of Parliament.

It follows, therefore, that except in the cases mentioned in  
the Navy and Marines (Wills) Act, 1865, any soldier in actual  
military service, and any mariner or seaman being at sea, can  
make a testamentary disposition of his personalty in the manner  
allowed before the Statute of Frauds.

It is not proposed here to go into a full discussion of the old  
law. It may, however, be useful shortly to state some of the  
more important points relating to the wills of these privileged  
persons.

Such privileged persons may make wills disposing of their Infancy.  
personal property, provided they have attained the age of four-  
teen. *In bonis Farquhar*, 4 N. of C. 651; *In bonis McMurdo*,  
1 P. & D. 540; Swinburne, part ii., sec. 2, p. 75.

The term soldier in section 11 of the Wills Act, includes an Soldier  
defined.  
officer and a surgeon. *Drummond v. Parish*, 3 Curt. 522; *In*  
*bonis Hayes*, 2 Curt. 338; *In bonis Donaldson*, 2 Curt. 386.

The words "on actual military service" are equivalent to on Military  
service.  
an expedition.

Thus a will made by an officer while quartered at home or  
abroad in barracks is not within this section. *Drummond v.*  
*Parish*, 3 Curt. 522; *White v. Repton*, 3 *ib.* 818; *In bonis*  
*Phipps*, 2 *ib.* 368; *In bonis Johnson*, *ib.* 341; *In bonis Hill*,  
1 Rob. 276; *Herbert v. Herbert*, D. & Sw. 10; see *In bonis*  
*Donaldson*, 2 Curt. 386.

The term "mariner or seaman" includes a purser and a Mariner  
defined.  
surgeon, and it seems the whole profession. *In bonis Hayes*,  
2 Curt. 338; *In bonis Saunders*, 1 P. & D. 16.

It also includes persons serving in the merchant service. *In*

**Chap. VII.** *bonis Milligan*, 2 Rob. 108; *Morrell v. Morrell*, 1 Hag. 51; *In bonis Parker*, 2 Sw. & T. 375.

**"At sea."** The term "at sea" appears to be equivalent to "on maritime service," including the period while the testator is returning from such service. Thus wills made on board a vessel in a river, or in port, have been held valid within section 11. *In bonis Austen*, 2 Rob. 611; *In bonis Corby*, 18 Jur. 634; *In bonis Lay*, 2 Curt. 375; *Seymour's Case*, cit. 3 Curt. 530; *In bonis Saunders*, 1 P. & D. 16; *In bonis McMurdo*, ib. 540.

**Nuncupative wills.**

The privileged persons above mentioned may make a nuncupative will, which will remain operative, though at the time of their death they may not be on service, or at sea. *Morrell v. Morrell*, 1 Hag. 51; *In bonis Leese*, 17 Jur. 216; see, too, *Leman v. Bonsall*, 1 Add. 389.

They may make a will by any testamentary paper, whether in their handwriting or not, and whether signed by them or not, provided it can be shown that such paper was intended to take effect as the testator's last will. *Friswell v. Moore*, 3 Phillim. 135; *Constable v. Steibel*, 1 Hag. 56; *Macclae v. Ewing*, 1 Hag. 317; *Read v. Phillips*, 2 Phillim. 122; *Masterman v. Maberly*, 2 Hag. 235. See *Rymer v. Clarkson*, 1 Phillim. 22; *In bonis Cosser*, 1 Rob. 633; *Fulleck v. Atkinson*, 3 Hag. 527; *Wood v. Medley*, 1 Hag. 661.

The following rules must be understood as relating only to wills of personalty not within the Statute of Frauds or the Wills Act.

**Proof of handwriting.**

A will not found in the testator's possession cannot be established merely on proof of the testator's handwriting. *Machin v. Grindell*, 2 Lee, 406; *Jameson v. Cooke*, 1 Hag. 82; *Crisp v. Walpole*, 2 Hag. 531; *Rutherford v. Maule*, 4 Hag. 213; *Bussell v. Marriott*, 1 Curt. 9; *Wood v. Goodlake*, 2 Curt. 82, 176; 2 Moo. P. C. 354, 436.

**Will with attestation clause, but not attested.**

A will bearing an execution or attestation clause, but unexecuted or unattested, will be presumed not to have been finally adopted as the will of the testator. *Scott v. Rhodes*, 1 Phillim. 19; *Abbott v. Peters*, 4 Hag. 380; *Beaty v. Beaty*, 1 Add. 154; *Montefiore v. Montefiore*, 2 Add. 357; *Stewart v. Stewart*, 2 Moo. P. C. 193; *Bragg v. Dyer*, 3 Hag. 207.

Such presumption may be rebutted, if sufficient grounds can be shown for the omission to execute or attest it, such as ill health, or unavoidable accident, or if it appears that it was intended to take effect as the testator's will in the form in which it is found. *In bonis Taylor*, 1 Hag. 641; *L'Huille v. Wood*, 2 Cas. t. Lee, 22; *Lamkin v. Babb*, 1 Cas. t. Lee, 1; *Scott v. Rhodes*, 1 Phillim. 12; *Masterman v. Maberly*, 2 Hag. 247; *Hoby v. Hoby*, 1 Hag. 146; *Forbes v. Gordon*, 3 Phillim. 614; *Thomas v. Wall*, 3 Phillim. 23; *In bonis Lamb*, 4 N. of C. 561; *Buckle v. Buckle*, 3 Phillim. 323; *Allen v. Manning*, 2 Add. 490; *Harris v. Bedford*, 2 Phillim. 177.

Where the will includes property, which can only be given by a will executed with certain formalities, the same presumption arises that the will was intended to be executed with such formalities. *In bonis Herne*, 1 Hag. 222, 226; *Douglas v. Smith*, 3 Knapp, 1; *Elsden v. Elsdon*, 4 Hag. 183; *Gillow v. Burne*, 4 Hag. 291; *Reynolds v. White*, 2 Lee, 214; *Reeves v. Glover*, 2 Lee, 359.

It seems if the will includes realty, and the gift of the personalty is made dependent on the gift of the realty, probate of the will as regards the personalty would be refused as well. *Tudor v. Tudor*, 4 Hag. 199, n.

A paper intended to be effectual, pending the preparation of a more formal document, will take effect as a will, if no formal document is executed. *Popple v. Cunison*, 1 Add. 377; *Forbes v. Gordon*, 3 Phillim. 614; *Hattatt v. Hattatt*, 4 Hag. 211.

Instructions for a will may take effect as a will, if the testator was prevented by death from executing a formal will. *Bone v. Spear*, 1 Phillim. 345; *Green v. Skipworth*, *ib.* 53; *Wood v. Wood*, *ib.* 357; *Huntington v. Huntington*, 2 *ib.* 213; *Sikes v. Snaitth*, *ib.* 351; *Must v. Sutcliffe*, 3 *ib.* 104; *Nathan v. Morse*, *ib.* 529; *Lewis v. Lewis*, *ib.* 109; *Allen v. Manning*, 2 Add. 490; *Goodman v. Goodman*, 2 Lee, 109; *Robinson v. Chamberlayne*, *ib.* 129; *Brown v. Farrant*, *ib.* 418; *Burrows v. Burrows*, 1 Hag. 109.

Where an interval intervenes between the preparation of

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instructions for a will and the death of the testator, the instructions will take effect as a will only upon evidence that the testator adhered to them down to his death. *Bone v. Spear*, 1 Phillim. 345; *Devereux v. Bullock*, *ib.* 60, 72; *Sandford v. Vaughan*, *ib.* 43; *In bonis Herne*, 1 Hag. 222; *Barwick v. Mullings*, 2 Hag. 225; *Mitchell v. Mitchell*, *ib.* 74; *Dingle v. Dingle*, 4 *ib.* 388; *Reay v. Cowcher*, 2 *ib.* 249; *Antrobus v. Nepean*, 1 Add. 399; *Monroe v. Coutts*, 1 Dow. 437; *Matthews v. Warner*, 4 Ves. 186; *Torre v. Castle*, 2 Moo. P. C. 133.

## Partial disposition.

An unexecuted paper, containing only a partial disposition of the testator's property, will not take effect as a will, unless it be shown to contain the final intention of the testator as far as it goes. *Montefiore v. Montefiore*, 2 Add. 354; *Cundy v. Medley*, 1 Hag. 140; *Maclae v. Ewing*, *ib.* 317; *In bonis Wenlock*, *ib.* 551; *In bonis Robinson*, *ib.* 643; *Devereux v. Bullock*, 1 Phillim. 60; *Sandford v. Vaughan*, *ib.* 48; *Theakston v. Marson*, 4 Hag. 290; *Bayle v. Mayne*, 3 Phillim. 504.

## Alterations.

Alterations in the will of a soldier, which was made while on actual military service, will be presumed to have been made during the continuance of such service. *In bonis Tweedale*, 3 P. & D. 204.

## Charge of legacies on realty.

A charge of legacies on real estate contained in a will duly executed to affect realty will include legacies given by a subsequent unattested will when the testator is one of the persons competent to dispose of his personalty by such will. *Buckeridge v. Ingram*, 2 Ves. J. 652; *Sheddon v. Godrich*, 8 Ves. 481; *Wilkinson v. Adam*, 1 V. & B. 445; *Swift v. Nash*, 2 Kee. 20; see *Rose v. Cunynghame*, 12 Ves. 29.

Legacies charged upon real estate as an auxiliary fund may be revoked by a subsequent valid will, though not executed so as to affect realty. *Brudenell v. Boughton*, 2 Atk. 268; *A.-G. v. Ward*, 3 Ves. 327.

Legacies charged only upon real estate cannot be revoked by a subsequent valid will not executed so as to affect realty. *Beckett v. Harden*, 4 Mau. & S. 1; *Locke v. James*, 11 M. & W. 901; see *Mortimer v. West*, 2 Sim. 274; *Fitzgerald v. Field*, 1 Russ. 428.

Legacies given out of a mixed fund of realty and personalty

can be revoked by a valid will not executed to affect realty only so far as they are payable out of the personalty. *Stocker v. Harbin*, 3 B. 479. Chap. VII.

A valid will of personalty not executed to affect realty may dispose of any portion of the personalty free from legacies, though the effect may be to increase a charge of legacies on realty contained in a prior will effectually disposing of real estate. *Coxe v. Bassett*, 3 Ves. 155.

The marriage of a privileged testator or the birth of a child subsequent to the date of the will will not alone revoke the will. *Doe v. Barford*, 4 M. & S. 10; *Wellington v. Wellington*, 4 Burr. 2171; *Wells v. Wilson*, 5 T. R. 52, note; *Jackson v. Hurlock*, Amb. 495. Revocation by marriage and birth of children.

But the birth of children alone after the date of the will affords a presumption against the will. *Johnston v. Johnston*, 1 Phillim. 447.

A privileged will is revoked by the subsequent marriage of the testator and the birth of children, unless the wife and children are provided for by the will or by a previous settlement. *Overbury v. Overbury*, 2 Stow, 242; see 1 Phillim. 479; *Kenebel v. Scrafton*, 2 East, 530; *Doe v. Lancashire*, 5 T. R. 49 (posthumous child).

The same rule applies to the case of a widower who marries a second time and has children, though the will may be in favour of children by the first marriage. *Christopher v. Christopher*, Dick. 445; *Holloway v. Clarke*, 1 Phillim. 339; *Walker v. Walker*, 2 Curt. 854. Marriage of widower.

It appears to be unsettled whether the birth of children by a first wife after the date of the will and marriage to a second wife revokes the will. *Gibbons v. Caunt*, 4 Ves. 848.

The will is not revoked where it does not dispose of all the testator's estate. See *Kenebel v. Scrafton*, 2 East, 541; *Marston v. Roe d. Fox*, 8 Ad. & E. 57; *Brady v. Cubitt*, Dougl. 40; *Doe v. Edlin*, 4 A. & E. 587.

Provision made for the wife alone by a settlement or by the will itself will not prevent its revocation. *Marston v. Roe d. Fox*, 8 A. & E. 14; 2 Nev. & P. 504. Provision for wife.

Provision by a settlement subsequent to the will will not

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prevent revocation. *Israell v. Rodon*, 2 Moo. P. C. 51; see *Talbot v. Talbot*, 1 Hag. 705; *Ex parte Ilchester*, 7 Ves. 348; *Johnson v. Wells*, 2 Hag. 561; *In bonis Cadzowold*, 1 Sw. & T. 34.

The will is not revoked where such revocation would not benefit the afterborn children. *Sheath v. York*, 1 V. & B. 390.

The fact that the wife and children predecease the testator will not revive the revoked will. *Helyar v. Helyar*, 1 Phillim. 413; *Sullivan v. Sullivan*, *ib.* 343; *Emerson v. Boville*, *ib.* 342; overruling *Wright v. Netherwood*, 2 Salk. 593, n.; 2 Phillim. 266, n.

In the case of privileged wills it seems clear that a will, though revoked by marriage and birth of children, may be set up again by evidence of intention to adhere to it, such wills being free from the operation of the Statute of Frauds and Wills Act. See *Marston v. Roe*, 8 A. & E. 14; *Gibbens v. Cross*, 2 Add. 455; *Fox v. Marston*, 1 Curt. 494; *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 1 Rob. 680; *Tapster v. Holtzappell*, 5 N. of C. 554.

## CHAPTER VIII.

## REVIVAL OF WILLS—INCORPORATION—SECRET TRUSTS.

THE Wills Act (1 Vict. c. 26), section 22, enacts, that no will or codicil, or any part thereof which shall be in any manner revoked, shall be revived, otherwise than by the re-execution thereof, or by a codicil executed in manner thereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

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No will re-  
voked to be  
revived other-  
wise than by  
re-execution,  
or a codicil  
to revive it.

Where a testamentary disposition is revoked by a subsequent disposition, which latter is in its turn revoked, the former disposition is not thereby revived. *Burtenshaw v. Gilbert*, Cowp. 49; *In bonis Brown*, 1 Sw. & T. 32; *Brown v. Brown*, 8 E. & B. 876; *Wood v. Wood*, 1 P. & D. 309.

Revocation  
of revoking  
will.

It has recently been doubted, whether since the Wills Act a codicil, described as a codicil to a will of a particular date which has been revoked, would be sufficient to revive the revoked will in the absence of any additional evidence of "intention to revive the same." *In bonis Steele*, 1 P. & D. 575.

Revival by  
codicil.

There is an obvious distinction between a codicil incorporating and giving effect to earlier unattested instruments, for which purpose a mere reference is sufficient, and a codicil reviving a revoked instrument.

There are, however, cases in which a codicil described as a codicil to a particular will which had been revoked by marriage,

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there being no other will in existence, has been held sufficient to revive the revoked will. *In bonis Chapman*, 1 Rob. 1; *Payne v. Trappes*, 1 Rob. 583.

This was clearly the rule before the Wills Act. *Lord Walpole v. Earl of Orford*, 3 Ves. 402; S. C. 7 T. R. 138.

In the case of *Neate v. Pickard*, 2 N. of C. 406, and in *In bonis Reynolds*, 3 P. & D. 35, there appear to have been express words of confirmation.

Contingent  
codicil.

It seems a codicil, described as a codicil to a will of a particular date, though the codicil is directed to take effect only in events which do not happen, may have the effect of reviving the will. *In bonis Da Silva*, 2 Sw. & T. 315; see *Parsons v. Lanoe*, 1 Ves. Sen. 190.

Codicil re-  
ferring to will  
revoked by  
later will.

If there are two wills, the latter of which revokes the earlier, it seems a codicil described as a codicil to the testator's last will, but giving the date of the revoked will, will not revive that will or revoke the second will. *In bonis May*, 1 P. & D. 581; *In bonis Ince*, 2 P. & D. 111. These cases may very well be supported on the ground that the description of the will by the codicil was ambiguous, the will of the date mentioned not being the last will of the testator, or, in fact, his will at all, as it had been revoked. See *In bonis Edge*, 9 L. R. Ir. 516.

In *In bonis Anderson*, 39 L. J. P. 55, the principle applied was the same. In that case the codicil was expressed to be a codicil to the testator's last will, but confirmed a will by date which had been revoked.

In *In bonis Wilson*, 1 P. & D. 582, the codicil, though referring to a revoked will by date, went on to refer to certain bequests as contained in that will, which were, in fact, contained in a later will. There was, therefore, a clear case of mistaken description.

If the codicil not only refers to the revoked will by date but also refers to the provisions of the revoked will, probate will be granted of the revoked will, the subsequent will and the codicil together. *In bonis Stedham*; *In bonis Dyke*, 6 P. D. 205.

Writing on  
the will  
referring to  
its contents.

A testamentary disposition, written at the foot of a will revoked by marriage, and referring to a bequest contained in the will, though not referring to the will in terms or described as a

codicil, is sufficient to revive the will. *In bonis Terrible*, 2 Sw. & T. 8. Chap. VIII.

The fact that a codicil is found attached by tape to a will which has been revoked by a later will will not revive the revoked will. *Marsh v. Marsh*, 1 Sw. & T. 528. Codicil attached to revoked will.

A will which has been destroyed and no longer exists in writing cannot be revived by a codicil, though there may be a draft of the will in existence. *Hale v. Tokelove*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. 118; *Rogers v. Goodenough*, 2 Sw. & T. 342. Destroyed will.

A codicil making an alteration in a will, and confirming it in all other respects, does not revive the will so far as it has been altered by intermediate codicils. *Crosbie v. Macdowal*, 4 Ves. 610; *Green v. Tribe*, 9 Ch. D. 231. Confirmation of will altered by codicil.

Any document in existence when the will is executed, and sufficiently described to enable it to be identified, may be incorporated with the will, and may be referred to for purposes of construction, whether incorporated in the probate or not. *Hutchings v. Wood*, 2 Moo. P. C. 355; *Aaron v. Aaron*, 3 De G. & S. 475; *In bonis Sunderland*, 1 P. & D. 198; *In bonis Mercer*, 2 P. & D. 91; *In bonis Daniell*, 8 P. D. 14; see *In bonis Pascall*, 1 P. & D. 606; *In bonis Gill*, 2 P. & D. 6; *Quihampton v. Going*, 24 W. R. 917. Incorporation of documents.

It has been said that the document must not only be in fact in existence when the will is executed, but also that it must be described as existing. *Van Straubenzee v. Monk*, 3 Sw. & T. 6; *In bonis Watkins*, 1 P. & D. 19; *In bonis Dallow*, *ib.* 189; *In bonis Sunderland*, *ib.* 198; *In re Kehoe*, 13 L. R. Ir. 13. Whether document must be described as existing.

It would seem, however, that if the document is proved to have been in existence at the date of the will, and is sufficiently identified by the description in the will, it is not necessary that it should be actually described as existing. See *Singleton v. Tomlinson*, 3 App. C. 404.

It seems that a document sufficiently referred to in the will, though not in existence, may be incorporated if it exists at the date of a codicil to the will. *In bonis Hunt*, 2 Rob. 622; *In bonis Stewart*, 32 L. J. P. 94; 3 Sw. & T. 192; 4 Sw. & T. 211; Incorporation of documents in existence at date of codicil.

Chap. VIII. *In bonis Lady Truro*, 1 P. & D. 201, not following *In bonis Mathias*, 32 L. J. P. 115; 3 Sw. & T. 100.

But for this purpose it must be clear that the will, if read as of the date of the codicil, refers to a definite instrument, and that the instrument in question satisfies the description in the will.

Thus, a codicil confirming a will, which directs certain property to be distributed as the testator may by any memorandum or deed direct, will not have the effect of incorporating memoranda executed between the dates of the will and codicil. *In bonis Lancaster*, 29 L. J. P. 155; see *In bonis Warner*, 10 W. R. 566.

Memorandum  
on back of  
will.

A memorandum not described as a codicil written on the back or the fourth side of a paper containing an invalid will to which it does not refer does not incorporate the will. *In bonis Drummond*, 2 Sw. & T. 8; *In bonis Tovey*, 47 L. J. P. 63; see *In bonis Willmott*, 1 Sw. & T. 36.

So a reference to executors "hereunder named," or the words "turn over," will not incorporate a clause not contained in the body of the will, though written before execution. *In bonis Dallow*, 1 P. & D. 189; *In bonis Dearle*, 39 L. T. N. S. 93; see *In bonis Watkins*, 1 P. & D. 19.

On the other hand, the words "see over," with an asterisk, have been held sufficient to incorporate a sentence on the second side of a sheet of paper, by the side of which was also written "see over," with an asterisk. *In bonis Birt*, 2 P. & D. 214.

The cases above cited on the subject of revival are also authorities on the subject of incorporation.

Memorandum  
referring to  
contents of  
will.

Thus it would seem that a memorandum at the foot of a will, referring to something contained in the will, would incorporate it, though there is no express reference to the will as such. *In bonis Terrible*, 2 Sw. & T. 8; *In bonis Widdrington*, 35 L. J. P. 66.

Upon similar principles it has been held that a testamentary disposition not described as a codicil, but written on the back of the will underneath two codicils described as codicils to the will, and altering a provision contained in the second codicil,

had the effect of republishing the will and codicils. *Guest v. Willasey*, 2 Bing. 429 ; 3 Bing. 614. Chap. VIII.

A reference by a duly attested codicil to a will incorporates the will, if there is only one document in existence to which the term "will" can apply. *Barnes v. Crowe*, 1 Ves. Jr. 485 ; *Doe d. Williams v. Evans*, 1 Cr. & Mee. 42 ; *Allen v. Maddock*, 11 Moo. P. C. 427 ; *In bonis Heathcote*, 6 P. D. 31. Reference to a will in a codicil incorporates an unattested will.

Similarly, a reference in a codicil to a prior unattested codicil will incorporate it. *Ingoldby v. Ingoldby*, 4 N. of C. 493 ; *Smith's Case*, 2 Curt. 796. Reference to unattested codicil.

A reference, however, in a codicil to a will and prior codicils, where there is a will and codicils duly attested, will not incorporate a codicil not duly attested. *Croker v. Marquis of Hertford*, 3 Curt. 468 ; 4 Moo. P. C. 339. Reference to will where there is a valid will and codicils.

And upon the same principle it would seem that a reference by a codicil to a will where there is a duly attested will and some unattested codicils will not set up the unattested codicils. *Utterton v. Robins*, 1 Ad. & E. 423 ; 2 Nev. & M. 821 ; *In the goods of Phelps*, 6 N. of C. 695 ; *Haynes v. Hill*, 7 N. of C. 256 ; see, however, *Radburn v. Jervis*, 3 B. 450 ; *Guest v. Willasey*, 2 Bing. 429 ; 3 Bing. 614. Reference to will where there is a valid will and unattested codicils.

Possibly a reference to a will in general terms would incorporate all the valid instruments constituting the will, such as a will and several codicils. Will may include will and codicils.

A codicil referring to a will by date incorporates the will of that date only, and not subsequent codicils. *Burton v. Newbery*, 1 Ch. D. 234 ; *In bonis Reynolds*, 3 P. & D. 35. Reference to will by date.

The case is not altered by the fact that a valid codicil referring to the will by date is written on the same paper as a valid will and an intermediate unattested codicil. *In bonis Hutton*, 5 N. of C. 598 ; *In bonis Phelps*, 6 *ib.* 695 ; *In bonis Willmott*, 1 Sw. & T. 36 ; *In re Spotten*, 5 L. R. Ir. 403.

Perhaps where a codicil is directed to be taken as part of the will, a subsequent codicil referring to the will by date and confirming it will have the effect of confirming the codicil as well. See *Gordon v. Lord Reay*, 5 Sim. 274, disapproved in *Burton v. Newbery*, *supra*.

If the codicil recites the will by date and a codicil by date,

**Chap. VIII.** and then confirms the "said will," the term "will" may include both will and codicil. *Aaron v. Aaron*, 3 De G. & S. 475.

As to whether a codicil headed "This is a fourth codicil to my will" would incorporate a codicil headed "This is a third codicil to my will," see *Stockil v. Punshon*, 6 P. D. 9.

Effect of incorporation.

Incorporation of an instrument into a will does not alter the effect of the instrument so far as it is already valid. So far as it is invalid as an independent instrument it takes effect as a testamentary disposition, subject to the ordinary rules as to lapse, ademption, &c., applicable to wills. *Bizzey v. Flight*, 3 Ch. D. 269.

Paper not in existence cannot be incorporated.

A paper not in existence at the date of the execution of a testamentary instrument cannot be incorporated in it or referred to for purposes of construction. *Countess Ferraris v. Lord Hertford*, 3 Curt. 468; *In bonis Watkins*, 1 P. & D. 19; *In bonis Dallow*, *ib.* 189; *Singleton v. Tomlinson*, 3 App. C. 404; *Smith v. Conder*, 9 Ch. D. 170.

Gift on trusts declared by parol to the trustee.

Where a gift is made by will to a person, and it appears on the face of the will that the gift is to be held on trust, but the trusts are not declared, oral evidence of the trusts is admissible if they have been communicated to the legatee prior to the execution of the will. *Crook v. Brooking*, 2 Vern. 50, 106; *Pring v. Pring*, 2 Vern. 98; *Irvine v. Sullivan*, 8 Eq. 673; *Riordan v. Banon*, 1 R. 10 Eq. 469; *In re Fleetwood*; *Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594; see *Scott v. Brownrigg*, 9 L. R. Ir. 246.

Power cannot be reserved by will of making a subsequent unattested will.

A testator cannot reserve by his will the power of making a testamentary disposition of his property by a subsequent unattested paper. *Habergham v. Vincent*, 2 Ves. Jr. 204; 4 B. C. C. 353; *Countess de Zichy Ferraris v. Marquis of Hertford*, 3 Curt. 468; 4 Moo. P. C. 339.

Thus, a gift to trustees to hold upon the uses appointed by a letter to be signed by the testator is invalid. *Johnson v. Ball*, 5 De G. & S. 85.

Persons to take under a particular description may depend on a subsequent

But there is no objection to a gift to persons to be ascertained by a subsequent act on the part of the testator, provided the act is one which must be done as the natural result of the state of the property at the date of the will, and is in no way de-

pendent upon a power reserved by the will. *Stubbs v. Sargon*, Chap. VIII.  
 2 Kee. 255; 3 M. & Cr. 507, where the gift was to the persons act of the  
 who should be in co partnership with the testatrix at the testator.  
 time of her decease, or to whom she should have disposed of her  
 business.

It has been said that where the will discloses that a bequest Gift on trust ;  
 is made to a person as a trustee, but the nature of the trusts is trust disclosed  
 not disclosed, evidence of the trusts is admissible, if they have later.  
 been communicated to the legatee after the execution of the  
 will. See *Moss v. Cooper*, 1 J. & H. 352; *Riordan v. Banon*,  
 1 R. 10 Eq. 469; *In re Fleetwood*; *Sidgreaves v. Brewer*, 49  
 L. J. Ch. 514; 15 Ch. D. 594, where *Johnson v. Ball*, 5 D. G. &  
 S. 85, which is an authority to the contrary, is discussed.

But if the trusts are contained in a letter not incorporated  
 with the will and not communicated to the trustees till after  
 the testator's death, the trusts fail. *Scott v. Brownrigg*, 9 L. R.  
 Ir. 246.

The distinction between the class of cases where it appears on  
 the face of the will that there is a trust and those mentioned  
 below, where an absolute bequest is made upon a secret trust  
 accepted by the legatee, though fine is real.

In the latter cases the legatee would be enabled to commit a  
 fraud if evidence of the trust were not admitted. In the former  
 cases he is a trustee upon the face of the will, and cannot there-  
 fore in any case take beneficially.

Where a gift is made in absolute terms, but the testator before Secret trust.  
 or after the date of his will communicates to the legatees his  
 intention that they are to hold the gift in trust, and they either  
 accept the trust or acquiesce in it by silence, evidence of the  
 trust is admissible. *Moss v. Cooper*, 1 J. & H. 352.

The details of the trust must be disclosed to the trustees in  
 the testator's lifetime, otherwise it cannot be enforced, and the  
 devisee will take as trustee for the next of kin or heir. *In re*  
*Boyes*; *Boyes v. Carritt*, 26 Ch. D. 531.

Where a gift is made to A. and B. on the faith of a promise Gift procured  
 by A., given before the gift is made, to apply it to certain by promise to  
 trusts, the trust is fastened on to the gift to both, though B. may hold it in trust.  
 not have been aware of the trust, on the principle that no one

Chap. VIII. can take advantage of a gift procured by fraud. *Russell v. Jackson*, 10 H. 204.

Gift to persons  
who subse-  
quently accept  
trust.

Where a gift is made to A. and B. as tenants in common, the intention being to create a trust which is subsequently communicated to A. but not to B., the gift to A. only is fixed with the trust. *Tee v. Ferris*, 2 K. & J. 357; *Rowbotham v. Dunnnett*, 8 Ch. D. 430.

If the gift is made to joint tenants, and the trust is subsequently disclosed to and accepted by one of them only, it seems the trust is fastened upon the whole gift. See *Jones v. Badley*, 3 Eq. 635; *Rowbotham v. Dunnnett*, 8 Ch. D. 430.

In cases of secret trust the intention to create a trust must be clearly established. *Jones v. Badley*, 3 Ch. 362; *McCormick v. Grogan*, L. R. 4 H. L. 82.

## CHAPTER IX.

## PROBATE AND ITS EFFECT.

EVERY instrument containing a testamentary disposition of Chap. IX. personal property, or affecting a prior testamentary disposition, What may be proved. is entitled to probate if properly executed and attested. *In bonis Durance*, 2 P. & D. 406.

A testamentary instrument appointing an executor is entitled Instrument appointing executor. to probate, though the executor renounces probate. *O'Dwyer v. Geare*, 1 Sw. & T. 465; 29 L. J. P. 47; *In bonis Lancaster*, 1 Sw. & T. 464; *In bonis Jordan*, 1 P. & D. 555.

A will to take effect upon a contingency is not admissible Contingent will. to probate for any purpose if the contingency does not happen, and is inoperative to revoke a previous will. *In bonis Hugo*, 2 P. D. 72.

But the principle does not apply to a codicil which will be Contingent codicil. admitted to probate, even if it is conditional and contains a declaration that it is not to be proved unless the condition is fulfilled, as it may have the effect of republishing the will. *In bonis Da Silva*, 2 Sw. & T. 315; *In bonis Colley*, 3 L. R. Ir. 243.

An instrument appointing guardians merely is not entitled Instrument appointing guardians. to probate. *In bonis Morton*, 33 L. J. P. 87.

In the case of wills of married women, before the Married Wills of married women. Women's Property Act, 1882, if the will was tendered for probate on the ground that it disposed of separate estate, it was the duty of the Probate Division to decide whether there was any separate estate, and to grant or refuse probate accordingly. *In bonis Tharp*, 3 P. D. 76.

In the case of a will made by a married woman under a

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power, if all the persons interested were before the Court, it was the duty of the Probate Division to decide whether there was a power, and also whether it had been executed. *In bonis Tharp*, 3 P. D. 76.

**Will of realty.** A will disposing of real estate only, though the real estate may be directed to be converted and debts and legacies may be directed to be paid, is not entitled to probate. *In bonis Drummond*, 2 Sw. & T. 118; *In bonis Bootle*, 3 P. & D. 177.

For the purpose of probate the proceeds of sale of land sold under the Settled Estates Act and subject to re-investment in land is to be treated as realty. *In bonis Lloyd*, 9 P. D. 65.

But if the real estate disposed of is under another instrument held upon trust for sale so as to be converted in equity, the will is entitled to probate. *In bonis Gunn*, 9 P. D. 242.

**Appointment of executor.**

A will disposing of realty only is entitled to probate if the testator appoints an executor. *In bonis Jordan*, 1 P. & D. 555; *In bonis Miskelly*, I. R. 4 Eq. 62.

The will of a married woman disposing only of real estate belonging to her for her separate use and appointing an executor was, even before the Married Women's Property Act, 1882, entitled to probate. *Brownrigg v. Pike*, 7 P. D. 61.

Before the Married Women's Property Act, 1882, the will of a married woman made in pursuance of a power, and taking effect only upon real estate, was not entitled to probate where the married woman survived the coverture without republishing the will, though an executor might be appointed. *O'Dwyer v. Geare*, 1 Sw. & T. 465; *In bonis Barden*, 1 P. & D. 325; *In bonis Tomlinson*, 6 P. D. 209.

But now the appointment of an executor would alone entitle the will of a married woman to probate. See *In re Jevvers*, 13 L. R. Ir. 1.

**Foreign will.**

Where a testator makes two wills not referring to each other, one of property in England and the other of property abroad, and appoints different executors, the foreign will is not entitled to probate. *In bonis Cood*, 1 P. & D. 449; *In bonis Smart*, 32 W. R. 724.

Where the testator made two wills, one of property vested in

him as trustee, the other of his own property, the two wills were included in one probate. *In bonis Claus*, 31 W. R. 924. Chap. IX.

A will perfect on the face of it and signed by the testator and having an attestation clause reciting that the will has been signed and declared by the testator as his last will, in the presence of two witnesses, present at the same time, who in his presence, and in the presence of each other, have thereunto set their names as witnesses thereto, and signed by the witnesses accordingly, is *prima facie* valid, and probate may be obtained on the oath of the executor only. Williams on Executors, 7th ed. 330. Proof by executor.

In the absence of an attestation clause, or if the attestation clause does not state the performance of the necessary ceremonies, the will must be proved by an affidavit of one of the witnesses. *Bryan v. White*, 2 Rob. 315; *Belbin v. Skeats*, 1 Sw. & T. 148; *Bowman v. Hodgson*, 1 P. & D. 362; *In bonis Wilson*, 1 P. & D. 269. Affidavit of witness.

If no evidence is obtainable from the attesting witnesses, the will will be presumed to have been duly executed, even in the absence of an attestation clause. *Burgoyne v. Showler*, 1 Rob. 5; *In bonis Luffman*, 5 N. of C. 183; *In bonis Dickson*, 6 N. of C. 278; *Vinnicomb v. Butler*, 13 W. R. 392; *In bonis Nicks*, 34 L. J. P. 30; *In bonis Rees*, *ib.* 56; *Foot v. Stanton*, 1 Dea. 19; 2 Jur. N. S. 380; *In bonis Torre*, 8 Jur. N. S. 494; *In bonis Puddephatt*, 2 P. & D. 97; see *In bonis Jones*, 46 L. J. P. 80; *Clarke v. Clarke*, 5 L. R. Ir. 47. Attesting witnesses dead

Declarations by a testator that he has duly executed his will are inadmissible as evidence of its due execution. *In bonis Ripley*, 1 Sw. & T. 68; see 1 P. D. 227. Declarations by testator.

A foreign probate will not affect personal property in England, but a duly authenticated copy of a will proved in a foreign country will be admitted to probate in England without further evidence of the validity of the will. *In bonis Smith*, 16 W. R. 1130; *In bonis Earl*, 1 P. & D. 450; *In bonis Hill*, 2 P. & D. 89; *Miller v. James*, 3 P. & D. 5; *In bonis Rule*, 4 P. D. 76; see *In bonis Prince Henry the 69th*, 49 L. J. P. 67; *In bonis Dost Aly Khan*, 6 P. D. 6; *In re Vallance*, 48 L. T. 941. Foreign probate.

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Where the will has been proved abroad the codicils must also be proved abroad. *In bonis Miller*, 8 P. D. 167.

As to Scotch confirmations, see 21 & 22 Vict. c. 56, ss. 12, 16; *In bonis Ryde*, 2 P. & D. 86; *Hood v. Lord Barrington*, 6 Eq. 218; *In bonis Ewing*, 6 P. D. 19.

As to Irish probates, see 20 & 21 Vict. c. 79, s. 95.

Whether incorporated document should be included in probate.

The question whether documents not in themselves of a testamentary character but incorporated with the will should be included in the probate is mainly one of convenience.

If the document is valid in itself independently of the will, it would seem that it need not be included in the probate, if there is a difficulty in procuring its production. *Sheldon v. Sheldon*, 1 Rob. 81; *In bonis Sibthorp*, 1 P. & D. 106.

If the document derives its validity from the will it ought, as a general rule, to be included in the probate. *Sheldon v. Sheldon*, *supra*.

If the document incorporated with the will is itself testamentary it should be included in the probate.

Thus, where an English will refers to and incorporates a foreign will the foreign will must be included in the probate, though the executors of the English will may have nothing to do with the property disposed of by the foreign will. *In bonis Harris*, 2 P. & D. 83; *In bonis Lord Howden*, 43 L. J. P. 26.

On the other hand, where the English will, though confirming a foreign will, expressly declares that the English will is to take effect independently of the foreign will, the latter need not be included in the probate. *In bonis Astor*, 1 P. D. 150.

Where a clause of a revoked instrument is incorporated the clause alone will be included in the probate. *In bonis Kehoe*, 7 L. R. Ir. 343.

Where will must be proved.

Probate of a will must be applied for in the Probate Division, and no proceedings can be taken under a will of personal property till the will has been proved, unless, perhaps, probate is alleged and admitted on the pleadings. *Pinney v. Hunt*, 6 Ch. D. 98; see *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294; *Priestman v. Thomas*, 9 P. D. 210; *Bradford v. Young*, 26 Ch. D. 656; see 29 Ch. D. 617.

Probate, how

By 20 & 21 Vict. c. 77, s. 62, it is provided that where the

will is proved in solemn form, or its validity declared in a contentious matter, the probate shall be conclusive evidence of the validity and contents of the will in all proceedings affecting real estate. Chap. IX.  
far evidence  
as to realty.

Section 64 provides in effect that if probate of a will not proved in solemn form is intended to be used in an action as evidence of a testamentary disposition affecting realty, ten days' notice before the trial of the intention to use the probate as evidence may be given; and if the opposite party does not, within four days after receiving such notice, give notice that he disputes the validity of the will, the probate will be *prima facie* evidence of the will, its validity and contents. *Barraclough v. Greenhough*, L. R. 2 Q. B. 612.

Where the will has not been proved there can be no doubt that an action will lie in the Chancery Division to establish it, so far as it relates to real estate. For the old practice on this subject, see a valuable note in Mr. Dunning's Concise Precedents, p. 510, *et seq.* Action to  
establish will  
of real estate.

Probate is conclusive upon the question whether the will does or does not express the true will of the testator. Chancery  
Division will  
not set aside  
will for fraud  
of legatee.

If the whole or any part of a will is procured by fraud the objection must be taken when probate is applied for.

After probate of a will has been granted no proceedings can be taken in the Chancery Division to have the legatee of the whole or any part of the property bequeathed declared a trustee on the ground of fraud. *Allen v. M'Pherson*, 1 H. L. 191; *Meluish v. Milton*, 3 Ch. D. 27.

It would seem that the same principle would apply even in such a case as that already cited of *Mitchell v. Gard*, 3 Sw. & T. 75, *supra*, p. 21; and see *Betts v. Doughty*, 5 P. D. 26; *In re Birchall*; *Wilson v. Birchall*, 29 W. R. 461.

In a Court of Construction no evidence is admissible to show that a clause was left in the will by mistake. *In re Bywater*; *Bywater v. Clarke*, 18 Ch. D. 17.

## CHAPTER X.

## WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

**Chap. X.**

1 Vict. c. 26,  
s. 3.  
All property  
may be dis-  
posed of by  
will;

comprising  
customary  
freeholds and  
copyholds  
without sur-  
render and  
before admit-  
tance; also  
such of them  
as could not  
be devised  
before the  
Act;

*estates pur  
autre vie;*

By the third section of the Wills Act, it is enacted that every person may, by his will, bequeath or dispose of "all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power thereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, execu-

tory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

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contingent interests;

rights of entry;

and property acquired after execution of will.

The effect of this section as regards copyholds is to enable the copyholder to devise his estate without a surrender. Until the devisee is admitted the customary estate descends to the heir. Though the lord will not be compelled to admit the heir if there is a devisee, he cannot seize because the devisee refuses to be admitted if the heir is willing to come in. *R. v. Garland*, L. R. 5 Q. B. 269; *Garland v. Mead*, *ib.* 6 Q. B. 441; see *Allen v. Bewsey*, 7 Ch. D. 453.

Devise of copyholds.

It has been suggested that lands of a testator dying without heirs which would therefore not devolve upon "the heir-at-law of him," but would escheat to the lord, are not within this section, and therefore that a will disposing of lands in such a case must be executed with the formalities required by the Statute of Frauds. *Williams' Real Prop.*, 14th ed., p. 130, note; *Dunning's Concise Prec.*, p. 3.

Lands liable to escheat.

It appears to be doubtful whether an estate *pur autre vie* limited to a man and the heirs of his body could be disposed of before the Wills Act, if the entail had not been barred. The better opinion seems to be that it could not; see *Campbell v. Sandys*, 1 Sch. & Lef. 294; *Hopkins v. Ramage*, Batty, 365; *Blake v. Luxton*, Coop. 185; *Allen v. Allen*, 2 Dr. & War. 307, 326; and see *Doe v. Luxton*, 6 T. R. 293; see 1 *Jarman*, 65.

Whether an estate *pur autre vie* to a man and the heirs of his body is devisable.

The Wills Act apparently leaves the point where it was, since sec. 3, which makes devisable all real estate which if not devised would devolve upon the heir-at-law, or customary heir,

- Chap. X.** or upon his executor or administrator, does not in terms extend to real estate, which would descend to the heir special, if not devised.
- Title by possession is devisable.** A person in possession of land without other title has a devisable interest. *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Clarke v. Clarke*, I. R. 2 C. L. 395; see *Gresley v. Mousley*, 4 De G. & J. 78.
- But not the right to sue in testator's name.** The third section does not make any kind of personalty bequeathable which could not be bequeathed before; thus a testator cannot bequeath a promissory note made to him so as to pass the right to sue on it, which remains in the executor. *Bishop v. Curtis*, 18 Q. B. 879.
- Property held in joint tenancy.** Property held by the testator in joint tenancy survives to the other joint tenants and cannot be given by will; thus, for instance, property transferred by the testator into the joint names of himself and his wife where there is nothing to rebut the presumption of advancement cannot be given by will, whether by specific gift or otherwise. *Dummer v. Pitcher*, 2 M. & K. 262; *Coates v. Stevens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 B. 97; *Turner v. A.-G.*, I. R. 10 Eq. 386.
- Power to arise upon a contingency.** A general power to an ascertained person to appoint the use in lands, where the power is to arise only upon a certain contingency, could always be executed before the contingency happened. *Dalby v. Pullen*, 2 Bing. 144; 9 J. B. Moore, 300; *Logan v. Bell*, 1 C. B. 872.
- Power to contingent person over the legal estate.** Prior to the Wills Act it was held that a general power to appoint property operating upon the legal estate given to the survivor of two persons could not be exercised till the survivor was ascertained. *Doe v. Tomkinson*, 2 Mau. S. 165.
- This doctrine, however, had no application to equitable estates, and is apparently abolished by the Wills Act. *Thomas v. Jones*, 1 D. J. & S. 63.
- But a special power to the survivor of two persons to appoint by will, cannot be exercised until the survivor is ascertained. *In re Moir's Trusts*, 46 L. T. 723; see *Macadam v. Logan*, 3 B. C. C. 310; *Cave v. Cave*, 8 D. M. & G. 131.
- Nor can a power to appoint to persons living at a certain time be exercised before the time arrives. *Blight v. Hartnoll*, 19 Ch. D. 294.

A power to be exercised by an instrument in writing could always be exercised by will. *Lisle v. Lisle*, 1 B. C. C. 533. Chap. X.

A general power to appoint by deed or instrument, sealed and delivered before a certain period, cannot be exercised by a will which does not take effect till after the period. *Cooper v. Martin*, 3 Ch. 47. Power to be exercised in writing.

A power to appoint by will to A. and others may be exercised after A.'s death. *Paske v. Haselfoot*, 2 N. R. 568; 33 B. 125.

Where a power of disposition over property is given to a person, the power may be exercised by deed or will, and will not be cut down to a testamentary power without clear words. Power of disposition not cut down to testamentary power.

Thus a gift to A. for life, with a power to dispose of the property then or at or after his decease, gives A. a power exercisable by deed or will. *Anon.*, 3 Leon. 71, pl. 108; *Ex parte Williams*, 1 J. & W. 89; *Tomlinson v. Dighton*, 1 P. W. 149; 1 Com. 194; *In re David's Trusts*, Jo. 495; *In re Mortlock's Trusts*, 3 K. & J. 456; *Humble v. Bowman*, 47 L. J. Ch. 62; *In re Jackson's Will*, 13 Ch. D. 189; see, too, *Sinnot v. Walsh*, 5 L. R. 1r. 27. The cases of *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 B. 469; and *Freeland v. Pearson*, 3 Eq. 658, may be considered overruled.

On the other hand, if any words are used which would be appropriate only to a testamentary gift, such as leave or bequeath, the power can only be exercised by will. *Doe v. Thorley*, 10 East. 438; *Walsh v. Wallinger*, 2 R. & M. 78; *Paul v. Hewetson*, 2 M. & K. 434.

Possibly, if the tenant for life is restrained from alienation, a power at her decease to dispose of property might be construed as testamentary only. *Archibald v. Wright*, 9 Sim. 161.

Under a gift to A. for life, with power to dispose of the property for her own use, with a gift over "in the event of her decease, should there be anything then remaining," the tenant for life has no power of disposition by will. *In re Thomson's Estate*; *Herring v. Barrow*, 13 Ch. D. 144; 14 Ch. D. 263.

A power to be exercised by an instrument in writing executed with certain formalities is exercisable by will executed with

**Chap. X** those formalities. *Kibbet v. Lee*, Hob. 312; *Smith v. Adkins*, 14 Eq. 402; *Orange v. Pickford*, 4 Dr. 363.

**Sec. 10 of the Wills Act.**

The 10th section of the Wills Act enacts that no appointment made by will in exercise of any power shall be valid unless the same be executed in manner thereinbefore required; and every will so executed shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

**Applies to powers created since the Act.**

The section applies to powers created since as well as to powers created before the Act. *Hubbard v. Lees*, L. R. 1 Ex. 255.

**But only to powers testamentary in terms.**

The section, however, only applies to powers which are in terms testamentary, and therefore a power to appoint by instrument in writing executed with certain formalities cannot be exercised by a will executed only with the statutory formalities. *West v. Ray, Kay*, 385; *Taylor v. Meads*, 4 D. J. & S. 597.

**Trust and mortgage estates.**

By section 30 of the Conveyancing and Law of Property Act, 1881, the trust and mortgage estates of testators dying after the 31st December, 1881, vest in their personal representatives.

The section applies to copyholds. *In re Hughes*, W. N. 1884, 53.

Before this Act the question frequently arose whether a trust could be devised, as to which the law appears to have stood as follows:—

**When a trust may be devised.**

When there was a gift to trustees and the survivor of them his heirs and assigns upon trusts to be executed by the trustees and the survivor of them his heirs and assigns, the power of executing the trusts could be devised by the will of the survivor. *Titley v. Wolstenholme*, 7 B. 425; *Hall v. May*, 3 K. & J. 585.

The same rule applied, when the gift was to the trustees, their heirs, executors, and administrators, the word assigns being omitted. *Osborne v. Rowlett*, 13 Ch. D. 774; see *In re Morton & Hallett*, 49 L. J. Ch. 559; 15 Ch. D. 143; *In re*

*Ingleby Boak*, 13 L. R. Ir. 326. The following cases, so far as Chap. X.  
they decide the contrary, may be considered overruled: *Cooke*  
*v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & S. 479;  
*Macdonald v. Walker*, 14 B. 556; *Ashton v. Wood*, 3 Sm. & G.  
436; 3 Jur. N. S. 1164.

## CHAPTER XI.

## EXECUTORS, GUARDIANS.

- Chap. XI.** A TESTATOR may appoint special executors of any portion of his property; see 2 Key & Elphinstone, 798; 4 Dav. Conv. 102; Dunning, Conc. Prec. 435.
- Special executors.** He may also appoint different executors for different countries. *In bonis Wallich*, 1 Sw. & T. 423; *Velho v. Leite*, *ib.* 456.
- The executor appointed in the country of the testator's domicile is entitled to receive the clear surplus in the hands of limited executors. *Eames v. Hacon*, 18 Ch. D. 347.
- Substituted executors.** A testator may substitute other executors in the event of the absence or death of those appointed. *In bonis Langford*, 1 P. & D. 458; *In bonis Foster*, 2 P. & D. 304.
- Delegation of power.** And he may delegate the power of appointing executors to another who may appoint himself. *In bonis Cringan*, 1 Hag. 548; *In bonis Ryder*, 2 Sw. & T. 127.
- Married woman executrix.** Since the Married Women's Property Act, 1882, a married woman can act as executrix without her husband's consent. *In bonis Ayres*, 8 P. D. 168.
- Before that Act, if the husband refused his consent, probate was granted to the married woman's attorney. *Clerke v. Clerke*, 6 P. D. 103.
- A person appointed executrix of all property not named in the will is not an executrix of the will or entitled to probate. *In bonis Wakeham*, 2 P. & D. 395.
- Executors appointed by several instruments.** Where there are several testamentary papers not inconsistent and each appointing sole executors, probate is granted to all the executors. *In bonis Graham*, 3 Sw. & T. 69; *Geaves v. Price*, 3 Sw. & T. 71. See *In bonis Morgan*, 1 P. & D. 323.

Reappointment by a codicil of some of the executors appointed by the will together with new executors does not revoke the appointment of executors contained in the will. *In bonis Leese*, 2 Sw. & T. 442; *In re Lloyd*, 1. R. 6 Eq. 348.

A codicil appointing a person "sole" executor of the will revokes the appointment of executors made by the will. *In bonis Lowe*, 3 Sw. & T. 478; *In bonis Baily*, 1 P. & D. 628.

Where a testator appointed A. without saying to what office, and afterwards referred to his executor, A. was held to be executor. *In bonis Bradley*, 8 P. D. 215.

Though no executors are expressly appointed, if the testator has directed any person to pay his debts and administer the estate, such person will be executor according to the tenor. *In bonis Montgomery*, 5 N. of C. 99; *In bonis Adamson*, 3 P. & D. 253; *In bonis Bluett*, 15 L. R. Ir. 140.

Thus, trustees to whom the testator's personal estate is given, subject to a charge of debts, are in effect executors. *In bonis Baylis*, 1 P. & D. 21; *In bonis Bell*, 4 P. D. 85; see *In bonis Palmer*, 11 L. R. Ir. 1.

A request that certain persons shall act for or with an executrix appointed by the will, makes them executors according to the tenor. *In bonis Brown*, 2 P. D. 110.

A person appointed to carry out the intentions of the will is executor according to the tenor. *In re Archdall*, 5 L. R. Ir. 168.

The appointment of a person sole trustee of a will will not in itself make him executor according to the tenor. *In bonis Punchard*, 2 P. & D. 369; *In bonis Lowry*, 3 P. & D. 157. See *Boardman v. Stanley*, 1. R. 6 Eq. 590; *Smith v. Kerran*, 1. R. 11 Eq. 447.

It seems trustees to whom the residue only is given on trust to pay debts are not executors. *In bonis Love*, 7 L. R. Ir. 178; see *In bonis Toomy*, 3 Sw. & T. 562.

And when in exercise of a testamentary power property is directed to be distributed by the trustees of the settlement, this does not make the trustees executors. *In bonis Fraser*, 2 P. & D. 183.

By 12 Car. II. c. 24, sect. 8, it is enacted that where any

**Chap. XI.** person hath or shall have any child or children under the age of one and twenty years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in *ventre sa mère*, or whether such father be within the age of one and twenty years, or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one and twenty years, or any lesser time, to any person or persons in possession or remainder, other than popish recusants; and that such disposition of the custody of such child or children made since the 24th of February, 1645, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise; and that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or retain such child or children, for the recovery of such child or children; and shall and may recover damages for the same in the said action, for the use and benefit of such child or children.

dispose of the  
custody of  
children  
during  
minority.

Actions of  
ravishment  
of wards.

The lands  
of children  
and the  
management  
of their per-  
sonal estate  
by their  
guardians.

The 9th section of the same statute enacts, that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children; and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective age of one and twenty years, or any lesser time, according to such disposition aforesaid; and may bring such action or actions in relation thereunto, as by law a guardian in common socage may do.

Section 1 of the Wills Act declares that the word will shall

include a disposition by will of the custody of a child under 12 Car. II. c. 24. It follows, therefore, that an infant cannot appoint testamentary guardians by will (section 7). Chap. XI.

An instrument appointing a testamentary guardian is valid though attested by the guardian. *Morgan v. Hatchell*, 24 L. J. Ch. 135.

The statute enables a father to give a testamentary guardian authority to nominate another as guardian. *In bonis Parnell*, 2 P. & D. 379. Father may delegate appointment of guardian.

A father has no legal power to appoint a testamentary guardian of his illegitimate children, though the person selected by him would in most cases be appointed by the Court. *Sleeman v. Wilson*, 13 Eq. 36. Illegitimate children.

The testamentary guardian has a legal right to the custody of the child, and is entitled to a writ of habeas corpus to obtain possession of his ward. *In re Andrews*, L. R. 8 Q. B. 153; see, too, *In re Ethel Brown*, 13 Q. B. D. 614. Guardian entitled to custody.

There is nothing to prevent a father from appointing a Roman Catholic ecclesiastic the guardian of his children. *Talbot v. Earl of Shrewsbury*, 4 M. & Cr. 672; *In re Andrews*, L. R. 8 Q. B. 153; *In re Byrnes*, I. R. 7 C. L. 199.

No precise words are necessary to appoint a testamentary guardian. How guardian appointed.

Thus it is sufficient to direct, that the children are to be brought up under the care and direction of a certain person, or that he is to have the management and care of the house and children, or that he is to take care to see the child educated. *Bridges v. Hales*, Moseley, 109; *Miller v. Harris*, 14 Sim. 540; 9 Jur. 388; *Lady Teynham v. Lennard*, 4 B. P. C. 302.

A person appointed guardian of the estate is not a testamentary guardian. *In re Norbury*, I. R. 9 Eq. 134.

The mother is the natural guardian, and if the father appoints no guardian the mother's right remains, even though the father directs that she shall not be guardian. *In re Wood*, 16 W. R. 164.

And this rule applies to an illegitimate child: *Reg. v. Nash*, 10 Q. B. D. 454.

A father is entitled to direct the religion in which he wishes his children to be brought up after his death. Religious education.

## Chap. XI.

But the cases show, that less weight will be given to the wishes of a deceased than to those of a living father, and that in the former case the Court will not interfere in favour of the religion selected by the father if he has done anything amounting to an abandonment of his rights, or if the interference would not be for the benefit of the children. *Hawksworth v. Hawksworth*, 6 Ch. 539; *Andrews v. Salt*, 8 Ch. 622; *In re Agar-Ellis*; *Agar-Ellis v. Lascelles*, 10 Ch. D. 49; 24 Ch. D. 317; *In re Clarke*, 21 Ch. D. 817; *In re Walsh*, 13 L. R. Ir. 269.

Property in  
dead body.

The executor is entitled to possession of the testator's corpse, and directions given by the will as to the disposition of the body are invalid. *Williams v. Williams*, 20 Ch. D. 659.

Persons  
having lawful  
custody of  
bodies may  
permit them  
to undergo  
anatomical  
examination  
in certain  
cases.

By 2 & 3 Will. IV. c. 75, "An Act for regulating Schools of Anatomy," s. 7, it is enacted that it shall be lawful for any executor, or other party having lawful possession of the body of any deceased person, and not being an undertaker, or other party interested with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.

Provision  
in case of  
persons direct-  
ing anatomical  
examinations  
after their  
death.

By section 8 of the same statute it is enacted, that if any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body, after death, be examined anatomically, or shall nominate any party by this Act authorised to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and in case of any such nomination as aforesaid shall request

and permit any party so authorised and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.

Upon the question of cremation, see the case of *R. v. Price*, Cremation. 12 Q. B. D. 247.

A testator may, there can be no doubt, appoint a person, agent, or solicitor to his estate in such a way as to entitle the person to be employed: *Hibbert v. Hibbert*, 3 Mer. 681; *Williams v. Corbet*, 8 Sim. 349. Appointment of agent or solicitor.

But a request that a particular person may be employed as manager or receiver, or a declaration that a particular person is to be the solicitor to the estate, does not impose on the trustees a duty to employ him: *Shaw v. Lawless*, 5 Cl. & F. 129; *Finden v. Stephens*, 2 Ph. 142; *Belaney v. Kelley*, 19 W. R. 1171; *Foster v. Elsley*, 19 Ch. D. 518.

## CHAPTER XII.

## ELECTION.

**Chap. XII.**

When election  
arises.

A TESTATOR can of course only dispose of his own property by will; however, by means of the doctrine of election, he may in many cases in effect dispose of the property of others. Thus, where a testator disposes of the property of a person, and at the same time gives that person property of his own by his will, the person whose property is given away is bound to elect whether he will keep his own property and surrender an equivalent value of the benefits given him by the will, or whether he will take entirely under the will. *Rogers v. Jones*, 3 Ch. D. 688; *Re Carpenter*; *Carpenter v. Disney*, 51 L. T. 773.

The compensation, which has to be made by a person electing to take against the will, is a charge upon the benefits he receives under the will, so that if he takes real estate under the will and dies before making compensation, the compensation is a charge on the land and is not payable out of his personal estate. *Pickersgill v. Rodger*, 5 Ch. D. 163.

Legatee must  
elect for or  
against the  
whole instru-  
ment, will, and  
codicils.

The person electing must elect to take under or against the whole instrument, will and codicils, and not merely that part of it which disposes of his own property. *Cooper v. Cooper*, L. R. 6 Ch. 15; *ib.* 7 H. L. 53.

Unless the  
testator limits  
the election to  
some particu-  
lar benefit.

If, however, there is a gift expressly in lieu of dower, or the testator declares that the legatee is to elect only between one of the benefits given him by the will and his own property, election will be confined to that. *Walker v. Inge*, Rom. N. of C. 95; *East v. Cook*, 2 Ves. Sen. 30, explained in *Wilkinson v. Dent*, 6 Ch. 339; *Coote v. Gordon*, I. R. 11 Eq. 180.

Gift in satis-  
faction of a  
debt will not

But a gift, though declared to be in satisfaction of any sums in which the testator may be indebted to the donee at the time

of his decease, or in satisfaction of a rent charge, the object being testamentary bounty, will put the legatees to their election to take under or against the whole will. *Wilkinson v. Dent*, 6 Ch. 339; see, too, *Coutts v. Acworth*, 9 Eq. 519. Chap XII.  
limit election  
to that par-  
ticular gift.

Election arises only between a gift by the will and something belonging to the legatee by a title *dehors* the will. Thus, no case for election arises where a testator has given a legatee several legacies, some of which are onerous. In such a case the legatee may reject the onerous legacies without forfeiting the others. *Andrew v. Trinity Hall*, 9 Ves. 525; *Moffett v. Bates*, 3 Sm. & G. 468; *Warren v. Rudall*, 1 J. & H. 1; *Aston v. Wood*, 22 W. R. 893; 43 L. J. Ch. 715. Election  
arises only  
between a  
title under  
and a title  
*dehors* the  
will.  
No election  
where one of  
two gifts is  
onerous.

And a legatee of a house subject to a mortgage and of an annuity is not bound to make up the interest on the mortgage if the house is insufficient to satisfy the mortgage debt. *Syer v. Gladstone*, W. N. 1885, 153.

But, if the onerous and beneficial legacies are given together as one entire gift, or there is an intention that the legatee shall not take one without the other, he must take all or none. *Green v. Britten*, 42 L. J. Ch. 187; *Talbot v. Lord Radnor*, 3 M. & K. 252; *Guthrie v. Walrond*, 22 Ch. D. 573; see *Fairtlough v. Johnstone*, 16 Ir. Ch. 442. Unless there  
is an intention  
that the  
legatee is to  
take all or  
none.

And upon the same principle election does not arise as between two clauses in the same will, the title to both the properties between which the legatee would have to elect being derived under the will. *Wollaston v. King*, 8 Eq. 165; *Wallinger v. Wallinger*, 9 Eq. 301. No election  
between two  
clauses of a  
will.

Devises and bequests upon condition must be distinguished from cases of election. *Cooper v. Cooper*, L. R. 6 Ch. 15; *ib.* 7 H. L. 53. Devise upon  
condition dis-  
tinguished  
from election.

In the latter it is immaterial whether the testator knew or not that the property of which he was disposing was not his own, in the former he must have known that it was not. The characteristic of the former is forfeiture, of the latter compensation. Thus a devise to A. on condition of his conveying certain property of his own would be a condition and not a case for election. See *Middleton v. Windross*, 16 Eq. 212; *Boughton v. Boughton*, 2 Ves. Sen. 12; *Fearon v. Fearon*, 3 Ir. Ch. 19.

In order to raise a case for election there must be on the face To raise elec-

**Chap. XII.** of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will.

**tion the testa-**  
**tor must actu-**  
**ally dispose of**  
**something not**  
**his own.** The intention to dispose of something not his own must appear on the face of the will, and evidence is not admissible to show that the testator considered certain property as his own, and intended to pass it by words not directly referring to it; see *Pole v. Lord Somers*, 6 Ves. 322; *Doe v. Chichester*, 4 Dow. 76, pp. 89, 90.

**Erroneous**  
**belief or**  
**recital will**  
**not raise elec-**  
**tion.** An erroneous belief on the part of the testator, even though he expressly declares that he has made his will on the faith of it, will not raise an election. *Langston v. Langston*, 21 B. 552; *Dashwood v. Peyton*, 18 Ves. 27; *Box v. Barrett*, 3 Eq. 244; see *Lewis v. Lewis*, 1 R. 11 Eq. 340.

**In respect of**  
**what property**  
**of a legatee**  
**election arises.** It makes no difference whether the property attempted to be disposed of by the testator is vested contingent or reversionary; though in the latter case, if the reversionary interest in personalty of a married woman is disposed of she cannot elect till her interest falls into possession. *Williams v. Mayne*, 1 R. 1 Eq. 519; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Wilson v. Lord Townshend*, 2 Ves. Jun. 697; see too *Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263; *In re Wheatley*; *Smith v. Spence*, 27 Ch. D. 606; *In re Vardon's Trusts*, 28 Ch. D. 124.

**Release of a**  
**debt due from**  
**a third person**  
**to a legatee.** The release of a debt due to the testator from A., the testator at the same time releasing a debt due from B. to A., will put A. to his election. *Synge v. Synge*, 15 Eq. 389; 9 Ch. 128.

**Legatee must**  
**be entitled to**  
**the property**  
**given away at**  
**the testator's**  
**death.** It is sufficient to raise election if the property disposed of by the testator is the property of a person taking a benefit under the will at the date of the testator's death, and a title as next of kin to an intestate whose estate has not at the date of the death been fully administered is sufficient. *Cooper v. Cooper*, L. R. 6 Ch. 15; *ib.* 7 H. L. 53; see *Bennett v. Houldsworth*, 6 Ch. D. 671.

**Title as next**  
**of kin to an**  
**intestate.** In such a case, for the purpose of election, the interest of the next of kin is to be estimated as it was at the death of the intestate, his debts being rateably distributed over his estate, *ib.*

But if the property in question is not acquired till after the death of the testator, no election arises in respect of it. *Howells v. Jenkins*, 2 J. & H. 706; 1 D. J. & S. 617; *Grissell v. Swinhoe*, 7 Eq. 291, in which case it seems the husband would have been

bound to elect if he had been his wife's administrator at the testator's death. See *Cooper v. Cooper*, 6 Ch. 15, p. 21. Chap. XII

And where a wife had elected to take an estate against the will, the husband, being tenant by the curtesy, was not again put to his election between his tenancy by the curtesy and benefits given to him by the will, compensation having been already made for the value of the estate. *Lady Cavan v. Pulteney*, 2 Ves. Jun. 544; 3 Ves. 384. Derivative title.

So, too, the right of a creditor to be paid out of property belonging to an intestate, and disposed of by the testator, being merely a personal right, will not put the creditor to election between his claim upon the intestate's estate and a benefit given by the will. See *Cooper v. Cooper*, L. R. 7 H. L. 53, p. 66. See *Kidney v. Coussmaker*. 12 Ves. 136. Mere personal right.

When a testator having a special power of appointment over certain property appoints absolutely to the objects of the power, and superadds a condition or request that they shall give the property in a certain way, no case of election arises, the illegal condition being considered struck out of the will. *Carver v. Bowles*, 2 R. & M. 301; *Blacket v. Lamb*, 14 B. 482; *Woolridge v. Woolridge*, Johns. 63; *Churchill v. Churchill*, 5 Eq. 44. See *King v. King*, 15 Ir. Ch. 479; *Moriarty v. Martin*, 3 Ir. Ch. 26; *White v. White*, 22 Ch. D. 555. Appointment under a special power with invalid condition superadded raises no election.

Where there is no absolute gift in the first instance, but the original gift is subject to invalid limitations over and restrictions, the objects of the power must elect between their rights under the power and the other benefits given them by the will. *Tomkyns v. Blane*, 28 B. 422; *White v. White*, 22 Ch. D. 555; *King v. King*, 13 L. R. Ir. 531. It does when the whole appointment is invalid.

And generally election arises, where property subject to a special power of appointment vested in the testator, is given by him to persons not the objects of the power when the latter receive benefits under the will. *Whistler v. Webster*, 2 Ves. Jun. 366. Property subject to a special power.

It has been held that where the property is appointed to objects of the power but the appointment is void for remoteness, the persons taking in default of appointment are not bound to elect. The case requires reconsideration. *In re Warren's*

**Chap. XII.** *Trusts*, 26 Ch. D. 208; see *In re Wheatley*; *Smith v. Spence*, 27 Ch. D. 606.

What is a disposition by a testator of property not his own.

It must be presumed *prima facie* that a testator only means to dispose of what is his own.

General words limited to testator's own property.

Therefore, even before the Wills Act, general words will not be construed to apply to property not belonging to the testator, though at the date of his will and his death he may have no property of his own to which the words could apply. *Read v. Crop*, 1 B. C. C. 492; *Jervoise v. Jervoise*, 17 B. 566; *Thornton v. Thornton*, 11 Ir. Ch. 474.

Devise in strict settlement where testator has only estate *pur autre vie*.

Nor will the fact that the devise is to uses in strict settlement extend general words to more than the testator's interest, though his devisable interest is only an estate *pur autre vie*. See *Cosby v. Lord Ashdown*, 10 Ir. Ch. 219.

The testator may of course show that he included lands not his own under the general words by describing them as lands in his own occupation. *Honywood v. Foster*, 30 B. 14.

Property in a particular place.

And if the devise be of property in a particular place, if there is any property of the testator answering the description it will be confined to that. *Rancliffe v. Parkyns*, 6 Dow. 149; *Maddeson v. Chapman*, 1 J. & H. 470.

Property held in joint tenancy.

So where a testator has transferred stock into the names of himself and his wife, a general gift of his stock, or even a gift of stock exactly the same in amount as that so transferred, will not put the wife to her election. *Dummer v. Pitcher*, 2 M. & K. 262; *Poole v. Odling*, 10 W. R. 337.

To raise a case of election there must be a specific reference to the stock in question. *Coates v. Stevens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 B. 97.

The case is more difficult where the testator has a devisable interest in certain property, and the question arises whether he intended to give the whole property.

When the testator is entitled in moieties.

1. Where the testator is entitled in moieties:

If the devise is of the testator's interest or property in a house or lands, only what belongs to him is intended to pass. *Henry v. Henry*, 1 R. 6 Eq. 286.

Gift of a house with a direction to repair.

But if the gift is of a house by a particular description, this is a sufficient indication of an intention to pass the whole house,

at any rate if there is a direction to repair. *Padbury v. Clark*, Chap. XII.  
 2 Mac. & G. 298; *Howell v. Jenkins*, 2 J. & H. 706. See *Swan*  
*v. Holmes*, 19 B. 471.

And the result is the same where there is no such direction.  
*Fitzsimons v. Fitzsimons*, 28 B. 417; *Miller v. Thurgood*, 33  
 B. 496; *Wilkinson v. Dent*, 6 Ch. 339.

2. Where land is subject to a charge, a devise of the land without more is a devise subject to the charge. *Stephens v. Stephens*, 3 Dr. 697; 1 De G. & J. 62; *Henry v. Henry*, I. R. 6 Eq. 286. When the testator is entitled to land subject to a charge.

On the other hand, if the testator repudiates the instrument creating the charge, and the dispositions of his will are inconsistent with that instrument, the property is intended to pass freed from the charge. *Sadlier v. Butler*, I. R. 1 Eq. 415.

So, too, if the devise of the land is inconsistent with the charge, as if it be for a long term on trust to raise a sum immediately for payment of debts and legacies, the prior charge being itself secured by a long term. *Blake v. Bunbury*, 1 Ves. Jun. 514.

3. Where the testator has a reversionary interest in land, limited to take effect after the decease of persons to whom he gives a life interest in those lands, so that the will would be of no effect if it were intended only to deal with the reversion, and there are besides powers of leasing and management implying actual enjoyment, the intention must have been to dispose of the whole property. *Welby v. Welby*, 2 V. & B. 187; *Wintour v. Clifton*, 21 B. 447; 8 D. M. & G. 641. When the testator is entitled to the reversion in lands.

So, too, a direction that an annuity is to be paid to a person for life out of lands of which the testator has only the reversion shows an intention to dispose of the whole. *Usticke v. Peters*, 4 K. & J. 437.

But if in a doubtful case the testator expressly confirms the settlement by which the reversion in the property in question is limited to him, only his own interest will be held to be intended to pass. *Rancliffe v. Parkyns*, 6 Dow. 149.

4. The question whether the testator has shown an intention to dispose of his real estate, freed from the widow's right to dower or freebench, is of importance only, with regard to the What amounts to an intention to dispose of lands free

**Chap. XII.** former, in the case of widows married prior to the 1st January 1834; and with regard to the latter, in the case of wills not coming under the Wills Act; see the Dower Act, 3 & 4 Will. 4, c. 105, ss. 4 and 14. *Lacey v. Hill*, 19 Eq. 346.

from dower or  
freebench.

As to freebench, it was decided in *Lacey v. Hill*, *supra*, that, by virtue of the third section of the Wills Act, a devise of copyholds, though not surrendered to the uses of the will, is sufficient to bar the widow's claim. The point does not appear to have been raised in *Thompson v. Burra*, 16 Eq. 592.

Gift in lieu of  
dower—

In cases, however, under the old law, the widow is, of course, put to her election if a legacy is given to her expressly in lieu of dower. *Sopwith v. Maughan*, 30 B. 235.

what it  
includes.

A legacy in lieu of dower would, it seems, also include freebench and dower out of lands which the testator had no power to devise. *Nottley v. Palmer*, 2 Dr. 93; *Walker v. Walker*, 1 Ves. Sen. 54. See *Wetherell v. Wetherell*, 4 Giff. 51.

What is in-  
consistent  
with the  
widow's right  
to dower.

If the dispositions of the will are inconsistent with the widow's right to have her dower set out by metes and bounds, she will be put to her election. This will be the case:—

Personal use  
by the de-  
visee.

a. If a house, being a portion of the property devised, is given for the personal use and occupation of the devisee. *Miall v. Brane*, 4 Mad. 119; *Roadley v. Dixon*, 3 Russ. 192.

Devise in  
definite pro-  
portions.

b. A devise of realty in definite proportions between the widow and others would not itself show that the widow was not intended to take her dower. But if the property is particularised so as to show that the testator is giving not merely his estate, but the whole property itself, this is sufficient to show that dower was meant to be excluded. *Reynolds v. Torin*, 1 Russ. 129; *Chalmers v. Storril*, 2 V. & B. 222, as explained in *Bending v. Bending*, 3 K. & J. 257. See *Roberts v. Smith*, 1 S. & St. 513. In *Dickson v. Robinson*, Jac. 503, the will is not stated.

Trust to sell  
and divide.

A direction that the proceeds of sale are to be divided in certain shares will not have this effect. *Ellis v. Lewis*, 3 Ha. 314.

Powers of  
leasing.

c. If powers of leasing are given, even though they be only from year to year. *Reynard v. Spence*, 4 B. 103; *O'Hara v. Chaine*, 1 J. & Lat. 662; *Parker v. Sowerby*, 1 Dr. 488; 4 D.

M. & G. 321; *Lowes v. Lowes*, 5 Ha. 501; *Hall v. Hill*, 1 Dr. & War. 94; *Linley v. Taylor*, 1 Giff. 67; see *Warbutton v. Warbutton*, 2 Sm. & G. 163. Chap. XIII

And it seems that a power of leasing is inconsistent with the widow's right to freebench, though it may not be the custom of the manor to set out freebench by metes and bounds. *Thompson v. Burra*, 16 Eq. 592.

But a trust for sale will not have this effect, unless the property given in trust for sale is specifically directed to include something such as a house, the whole of which the testator must have intended to be subject to the trusts. *Gibson v. Gibson*, 1 Dr. 42; *Bending v. Bending*, 3 K. & J. 257; *Parker v. Downing*, 4 L. J. Ch. 198. Trust for sale.

The gift of an annuity to the wife, charged upon the property subject to dower, will not put her to election. *Dowson v. Bell*, 1 Keen, 761; *Harrison v. Harrison*, 1 Keen, 765; *Holdich v. Holdich*, 2 Y. & C. C. 18. Gift of annuity charged on land subject to dower.

Nor will a devise of a portion of the testator's real estate to his widow prevent her from claiming dower in the rest. *Lawrence v. Lawrence*, 2 Ver. 365; 1 Eq. C. Ab. 218, pl. 2; 1 Freem. 234; 3 B. P. C. 484.

5. Under the old law, by which a testator was unable to dispose of lands acquired after the date of his will, the heir was nevertheless put to his election if there was a clear intention to dispose of them. When the heir is put to election.

It is clear that such an intention is sufficiently indicated where the testator draws a distinction between land to which he is and lands to which he may be entitled at his decease. *Schroder v. Schroder*, Kay, 578; 24 L. J. Ch. 510; *Hance v. Truwhitt*, 2 J. & H. 216. Disposition of after-acquired lands before the Wills Act.

And it seems the words "land which I shall die possessed of" sufficiently indicate an intention to pass after-acquired lands, and not merely so much of the lands belonging to the testator at the date of his will as shall remain at his death. *Churchman v. Ireland*, 1 R. & M. 250, overruling *Back v. Kett*, Jac. 534.

Under the old law, where the will was insufficiently executed to pass realty, the heir was not put to his election. No election when the will

**Chap. XII.** between realty attempted to be disposed of by the will and  
 invalid to pass benefits given to him, so much of the will as attempted to  
 realty. dispose of realty being considered non-existent. *Sheddon v. Godrich*, 8 Ves. 481.

So, too, when under the old law the testator was incompetent to dispose of property from infancy or coverture no case of election arose. *Hearle v. Greenbank*, 1 Ves. 298; 3 Atk. 697, 716; *Rich v. Cockell*, 9 Ves. 370.

But the case is different where the devise is upon condition. *Boughton v. Boughton*, 2 Ves. Sen. 12.

**Foreign heir.** These rules do not, however, apply to a foreign heir, and therefore if there is clear evidence of an intention to dispose by will of land in Scotland or elsewhere which cannot be so disposed of, the heir is put to his election between the land and the benefits he may take under the will. *Brodie v. Barry*, 2 V. & B. 127; *Dewar v. Maitland*, L. R. 2 Eq. 834.

It must be clear that land in Scotland or elsewhere is referred to, and therefore general words will only be held to refer to those lands upon which the will can take effect. *Johnson v. Telford*, 1 R. & M. 244; *Allen v. Anderson*, 5 Ha. 763; *Maxwell v. Maxwell*, 16 B. 106; 2 D. M. & G. 705; *Maxwell v. Hyslop*, 4 Eq. 407.

But a devise of "all my real estate in any part of the United Kingdom or elsewhere" has been held sufficient to put the Scotch heir to election. *Orrell v. Orrell*, 6 Ch. 302.

**Will of married woman.**

It would seem that no case for election arises on the part of next of kin, where the will of a married woman is operative at the time it was made, but afterwards becomes inoperative. *Blaklock v. Grindle*, 7 Eq. 215.

**To raise election there must be a gift of free disposable property to the persons whose property is given away.**

The principle of election being compensation, in order to put persons whose property the testator has given away to their election, there must be a gift to them of free disposable property out of which compensation may be made. Thus an appointment by the testator of property, subject to a special exclusive power of appointment, to some objects of the power whose property the testator attempts to dispose of, is not a gift of free disposable property, in respect of which they will be bound to elect. *Fowler's Trust*, 27 B. 362; *Aplin's Trust*, 13 W. R. 1062.

Where an interest is given to a married woman with a restraint on anticipation and the testator disposes of property to which the married woman is entitled the cases are conflicting upon the question whether the married woman is put to her election. *Willoughby v. Middleton*, 2 J. & H. 344, see 8 Ch. 590; *In re Vardon's Trusts*, 28 Ch. D. 124; *In re Queade's Trusts*, 33 W. R. 316, being in favour of election. *Smith v. Lucas*, 18 Ch. D. 531; *In re Wheatley*; *Smith v. Spence*, 27 Ch. D. 606, being against election.

Upon the question, whether, where a stranger appoints a testamentary guardian to children and gives their father a benefit under the will, the father is put to his election, so that he cannot after receiving the legacy withhold compliance with the condition for the education of his children, see *Blake v. Leigh*, Amb. 306; *De Manneville v. De Manneville*, 10 Ves. 52, 63.

## CHAPTER XIII.

## WHO MAY BE DEVISEES OR LEGATEES.

**Chap. XIII.****1. Corporations.**

1. PRIOR to the Wills Act a devise of lands to a corporation was void, bodies corporate being excepted out of the statutes 32 Hen. 8, c. 1, 34 & 35 Hen. 8, c. 5. s. 5.

And it seems the stat. 43 Eliz. c. 4, had no effect in passing the legal estate where the devise was to a corporation existing for charitable purposes, notwithstanding *Benet Coll. v. Bishop of London*, 2 W. Bl. 1182; see *Inc. Soc. v. Richards*, 1 Dr. & War. 258.

The Wills Act repeals the statutes 32 Hen. 8, c. 1, and 34 & 35 Hen. 8 c. 5, but does not expressly authorise devises to corporations, and since the inability of corporations to hold lands was created by various statutes antecedent to the 34 & 35 Hen. 8, c. 5, the mere repeal of that statute does not give validity to devises to corporations.

Since the Wills Act, however, the inability is not in the power of devising, but in the capacity of corporations to take, and it would seem to follow that corporations with power to hold land, such as companies incorporated under the Companies' Act, 1862 (25 & 26 Vict. c. 89), might take by devise except so far as objections might arise on the ground of perpetuity. The question is, however, not likely to be of much practical importance; see *Incorp. Soc. v. Richards*, 1 Dr. & War. 258; *Thompson v. Shakepear*, Joh. 612; 1 D. F. & J. 399; *Curne v. Long*, 2 D. F. & J. 75; *Cocks v. Mannors*, 12 Eq. 574; *Chaudière Mining Company v. Desbarats*, L. R. 5 P. C. 277.

**2. Aliens.**

2. By the statute 33 Vict. c. 14, real and personal property of every description may be taken, acquired, held, or disposed of

by an alien in the same manner in all respects as by a natural-born British subject. Chap. XIII.

As to what constitutes an alien, see *De Geer v. Stone*, 22 Ch. D. 243.

It has been decided that the Act is not retrospective. And apparently it does not apply to a will made before the passing of the Act, though not coming into operation till afterwards. *Sharp v. St. Sauveur*, 7 Ch. 343.

In cases before the Act land devised to an alien remains in him till office found, when it devolves to the Crown, and this is the case whether the land is devised to trustees or not. *Barrow v. Wadkin*, 24 B. 1; *Sharp v. St. Sauveur*, 7 Ch. 343.

An alien could always take the proceeds of land devised on trust for sale. *Du Hourmelin v. Sheddon*, 1 B. 79; 4 M. & Cr. 525.

3. Formerly personal property vested in a felon after his conviction, during the period of his punishment or before his pardon, was forfeited to the Crown. *Roberts v. Walker*, 1 R. & M. 752.

But property not vested in a felon till after his imprisonment was not forfeited. *Stokes v. Holden*, 1 Kee. 145; *Barnett v. Blake*, 2 Dr. & S. 117; *Gough v. Davies*, 2 K. and J. 623; *Re Thompson's Trusts*, 22 B. 506; *Re Harrington's Trust*, 29 B. 24.

Now, by 33 & 34 Vict. c. 23, forfeiture and escheat for treason, felony, and suicide are abolished; and by section 10 all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards become entitled, vests in an administrator appointed under the Act.

By the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 3, outlawry in consequence of any civil proceeding is abolished.

4. By the 15th section of the Wills Act, a legacy given to an attesting witness, or to the husband or wife of an attesting witness, is void. 4. Attesting witnesses.

The subsequent marriage of an attesting witness to a devisee does not avoid the devise. *Thorpe v. Bestwick*, 6 Q. B. D. 311.

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A person attesting the signature of two marksmen, witnesses to a will, is himself an attesting witness. *Wigan v. Rowland*, 11 Ha. 157.

But a gift by will to the attesting witness of a codicil is good. *Gurney v. Gurney*, 3 Dr. 208.

Where, however, a contingent gift by will is made absolute by a codicil which the legatee attests, and the legatee could only have taken under the codicil, the gift is void. *Gaskin v. Rogers*, L. R. 2 Eq. 284.

And a gift to an attesting witness is void, though there may be a sufficient number of witnesses without him. *Randfield v. Randfield*, 11 W. R. 847, see 8 H. L. 225; *Cosens v. Crout*, 21 W. R. 781; see *In bonis Sharman*, 1 P. & D. 661, and see *ante*, p. 27.

A gift to a witness attesting the will is good, if the will is afterwards revived by a codicil referring to it. *Anderson v. Anderson*, 13 Eq. 381.

A gift to an attesting witness as trustee is not void. *Cresswell v. Cresswell*, 6 Eq. 69.

A gift to a trustee upon trusts declared by parol in favour of an attesting witness is void. *In re Fleetwood; Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594.

## CHAPTER XIV.

DESCRIPTION.—WHAT PASSES UNDER A SPECIFIC  
DESCRIPTION.

WITH regard to the question what evidence is admissible for the purpose of discovering to what the terms of description employed by the testator refer, evidence of the testator's intention must be distinguished from evidence of circumstances from which the Court may conclude what the testator's intention must have been. The former evidence is admissible only in rare cases. The latter is generally admissible. Thus:

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What evidence is admissible.

1. "All facts relating to the subject matter of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." *Doe d. Templeton v. Martin*, 4 B. & Ad. 771, 785, *per Parke, J.*; *Sanford v. Raikes*, 1 Mer. 646.

Surrounding circumstances.

2. Words of art, foreign words, nicknames may be explained by evidence. *Kell v. Charmer*, 23 B. 195; *Goblet v. Beechey*, 3 Sim. 24; 2 R. & My. 624; *Lee v. Pain*, 4 Ha. 251; *Studd v. Cook*, 8 App. C. 577; *Bradford v. Young*, 26 Ch. D. 656; see 29 Ch. D. 617.

Terms of art.

3. Where a word has a meaning in common use, but has a different meaning by local custom, evidence of the custom is admissible. *Shore v. Wilson*, 9 Cl. & F. 545, 566; *Richardson v. Watson*, 1 Nev. & M. 575; *Clayton v. Gregson*, 5 A. & E. 302; *Smith v. Wilson*, 3 B. & Ad. 728; *Anstee v. Nelms*, 1 H. & N. 225.

Evidence of custom.

It has been held that, where a measure is defined by statute, evidence is not admissible to show that the word has a different meaning by custom. *O'Donnell v. O'Donnell*, 1 L. R. Ir. 284; 13 *ib.* 226.

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Word with natural meaning but nothing to which it can apply.

Word with natural meaning and something to which it applies.

Devise of estate by name.

Devise of estate of or at A.

Patent ambiguity may not be explained.

Where there is something answering the testator's description that alone passes.

Reference to occupation.

4. Where a word has a meaning in ordinary language, but there is nothing to which it can apply, evidence is admissible to show that the testator used the word in a meaning peculiar to himself. The case falls within the second head above mentioned.

5. But if the word has a meaning in ordinary language, and there is something to which it applies, evidence is not admissible to show that the testator used it in a different or wider sense, there being no general custom to that effect. *Millard v. Bailey*, L. R. 1 Eq. 378.

6. If lands are devised by a particular title, evidence is admissible to show what the testator habitually included under the name. *Doe d. Beach v. Lord Jersey*, 3 B. & C. 180 1 B. & Ald. 554; *Ricketts v. Turquand*, 1 H. L. 472; *Webb v. Byng*, 1 K. & J. 580; *Whitfield v. Langdale*, 1 Ch. D. 61 (devise of Claggetts); *Jennings v. Jennings*, 1 L. R. Ir. 552; see *King v. King*, 13 L. R. Ir. 531.

7. Where a testator devises his estate of A., or at A., and there is an estate answering the description, evidence is not admissible to show in what sense the testator used the expression. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; 4 Dow. 65; *Doe d. Browne v. Greening*, 3 M. & S. 171.

8. No evidence is admissible to explain a patent ambiguity; for instance, if the testator uses symbols, which on the face of the will require explanation and have no meaning to any one but himself. *Clayton v. Lord Nugent*, 13 M. & W. 206; see *Sullivan v. Sullivan*, 1 R. 4 Eq. 457.

When the admissible evidence has been taken, the following rules apply to determine to what the words of description used by the testator refer:

1. *Non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram.*

Therefore, where there is property, which exactly fits all the terms of the description, the whole of it passes and no more.

It is immaterial whether the larger words precede or follow the restricting words, provided there is something to which the whole description applies.

Thus, a devise of lands described as in the parish A., and in

the occupation of a particular person, will not pass lands not in the occupation of that person. *Doe d. Parkin v. Parkin*, 5 Taunt. 321; *Morrell v. Fisher*, 4 Eq. 591; *Homer v. Homer*, 8 Ch. D. 758. Chap. XIV.

So the general description may be restricted by a reference to the person from whom the testator purchased or derived the land. *Doe d. Tyrrell v. Lyford*, 4 M. & S. 550; *Doe d. Conolly v. Vernon*, 5 East, 51; *Doe d. Harris v. Greathed*, 8 East, 91; *Roe d. Ryall v. Bell*, 8 T. R. 579; *Doe d. Newton v. Taylor*, 7 B. & C. 384; *Cooch v. Walden*, 46 L. J. Ch. 639; see *Corballis v. Corballis*, 9 L. R. Ir. 309. Reference to title of person from whom lands derived.

If the lands are described as being at A. in the county of B, lands not in that county will not pass. *Webber v. Stanley*, 16 C. B. N. S. 698; *Pedley v. Dodds*, 2 Eq. 819. Reference to county.

Description of a farm as freehold excludes a leasehold portion of the farm. See p. 159; *Stone v. Greening*, 13 Sim. 390; *Hall v. Fisher*, 1 Coll. 47. Freehold farm.

It seems that a devise of lands at A. is not to be limited to lands within the parish of A., but would carry immediately adjoining lands in a neighbouring parish. Devise of lands at A.

This is clearly the case where the devise is of lands at or near A. *Homer v. Homer*, 8 Ch. D. 758.

But a devise of lands at A. will not include lands some distance from A., where there are lands to which the description applies. *Attwater v. Attwater*, 18 B. 330; *Doe v. Bower*, 3 B. & Ad. 453; see *Doe d. Dell v. Pigott*, 1 J. B. Moo. 274; 7 Taunt. 552; *Pogson v. Thomas*, 8 Sc. 621; 6 Bing. N. C. 337.

A devise of a manufactory on the west side of a street, with the appurtenances, will not include a manufactory on the east side of the street. *Smith v. Ridgway*, L. R. 1 Ex. 46, 331. Manufactory in a street.

A devise of property in a street may pass the whole of a piece of land which, when purchased by the testator, had a frontage on that street and on another street, though the testator has subsequently divided the land, and built two houses upon it, one abutting on one street and one on the other. *Harman v. Gurner*, 35 B. 478; see, too, *Newton v. Lucas*, 6 Sim. 54; 1 M. & Cr. 391.

A devise of two houses in a street will pass only two houses, though the testator may be possessed of three houses in the Property held under lease.

**Chap. XIV.** street held under the same lease, two of which are comprised in one underlease, and the third in a separate underlease. *Tapley v. Eagleton*, 12 Ch. D. 683.

So a devise of certain lands held under a lease where the testator goes on to describe the lands by name passes only such of the lands held under the lease as are named. *West v. Lawday*, 11 H. L. 375.

Everything included under the name at the testator's death passes.

In wills, since the Wills Act, everything included under the particular description at the death of the testator, though added to the estate after the date of the will, will pass. *In re Midland Railway Co.*, 34 B. 525; *Castle v. Fox*, 11 Eq. 542. *Webb v. Byng*, 1 K. & J. 580, is *contra*, but the point was barely argued. See *In re Portal and Lamb*, 27 Ch. D. 600; rev. W. N. 1885, 146.

As to whether the words "*now occupied by me*" would prevent lands subsequently taken into occupation from passing, see *Hutchinson v. Barron*, 9 W. R. 538; 6 H. & N. 583; *Jepson v. Key*, 10 Jur. N. S. 392; 12 W. R. 621; *Williams v. Owen*, 2 N. R. 585, and see *post*, pp. 144, 156.

Inaccurate description—part inaccurate ;

2. *Falsa demonstratio non nocet, cum de corpore constat.*

a. Thus, where an object is sufficiently described, additional words, which have no application to anything, may be rejected. *Blague v. Gold*, Cro. Car. 447, 473; *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1.

Subordinate description if inaccurate rejected.

b Where there is a complete description, and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description, may be rejected. *Armstrong v. Buckland*, 18 B. 204; see *Slingsby v. Grainger*, 7 H. L. 273; *Travers v. Blundell*, 6 Ch. D. 436.

Inconsistent description.

c. Where there is one continuous description, and there is something answering to part of it, and something answering to other part, but the two together are inconsistent, the question is, which are the leading words of description.

In the first class of cases under this head there is no repugnancy between the general terms and the particular super-added description, in the second and third class there is a repugnancy between two parts of a description.

Where the estate is devised by a specific name, followed by a Chap. XIV.  
reference to occupation, the reference to occupation may be Name fol-  
lowed by  
occupation.  
rejected if the whole estate known by the name is not in the  
occupation of the person referred to. *Goodtitle d. Radford v.*  
*Southern*, 1 M. & S. 299; *Down v. Down*, 7 Taunt. 343; 1  
J. B. Moo. 80; see *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald.  
550; 3 B. & Cr. 870; *Paul v. Paul*, 1 W. Bl. 255; 2 Burr.  
1089; see, too, *Cunningham v. Butler*, 3 Giff. 37; 7 Jur. N. S.  
461; *In re Boulter*, 4 Ch. D. 241.

Upon similar principles a description by a specific name will Name fol-  
lowed by  
locality.  
prevail over an erroneous reference to a parish or county, or to  
acreage. *Hardwick v. Hardwick*, 16 Eq. 168; *Whitfield v.*  
*Langdale*, 1 Ch. D. 64.

Though the estate is not described by a specific name, if the  
general description contains words which would not be satisfied  
if the reference to occupation is allowed to restrict the devise,  
the reference to occupation may be rejected. *White v. Birch*,  
36 L. J. Ch. 174; see *Doe d. Parkin v. Parkin*, 5 Taunt.  
321.

For the purpose of ascertaining the leading words, it would What are the  
leading words.  
seem that where a description is followed by restrictive words  
inconsistent with it, the earlier words will prevail, especially if  
the restrictive words are less clear and accurate than the  
earlier words. Cases *supra*, and *Doe d. Remow v. Ashley*, 10  
Q. B. 663.

Where the more restricted description of property is followed  
by a wider description, which would include other property as  
well, it seems the more restricted description will prevail; for  
instance, under "my lands in Cokefield, called Hayes Lands,"  
only so much of the Hayes Lands as were in Cokefield passed.  
*Woodden v. Osbourn*, Cro. El. 674; *Hull v. Fisher*, 1 Coll. 47.

Of course, if the restrictive words can be looked upon as  
inserted for the purpose of giving the lands carved out of the  
devise to some one else, they will have their full force. *Higham*  
*v. Baker*, Cro. Eliz. 16; *Press v. Parker*, 10 J. B. Moo. 158; 2  
Bing. 456.

3. Where there is nothing answering to any part of the No property  
answering  
description.  
description the devise fails.

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Thus a devise of lands in a particular county or parish cannot be extended to lands in an adjoining county or parish, though those may be the only lands the testator possessed. *Miller v. Travers*, 8 Bing. 244; *Barber v. Wood*, 4 Ch. D. 885.

Same rules apply to specific bequests.

4. The same rules are applicable to specific bequests of personal property. Therefore, if there is something which answers fully the words of description, that and that alone will pass. *Slingsby v. Grainger*, 7 H. L. 273; *Ridge v. Newton*, 2 D. & War. 239; *Townend v. Townend*, 1 L. R. Ir. 180.

Gift of some out of more.

5. If the testator gives a certain number of specific things, and is possessed at the date of his death of a larger number, the legatee is entitled to select which he will take. *Hobson v. Blackburne*, 1 M. & K. 571; *Jacques v. Chambers*, 2 Coll. 435; *Millard v. Bailey*, L. R. 1 Eq. 378; *Tapley v. Eagleton*, 12 Ch. D. 683; see *Duckmanton v. Duckmanton*, 5 H. & N. 219; 28 L. J. Ex. 132.

The principle applies as well to a devise as to a gift of personalty.

It is immaterial whether or not the devise is made in such words as to show that the testator was aware that he was possessed of more of the things in question than he devises.

For instance, the devisee is entitled to elect whether the devise is of one of my closes called Whiteacre, or of my close called Whiteacre. *Richardson v. Watson*, 4 B. & Ad. 787, is not to be followed; see *Tapley v. Eagleton*, *supra*.

Gift of such parts as legatee selects.

Under a gift of such parts of certain property as a legatee shall signify her desire to possess, the legatee may take the whole, if the property is of such a nature that the legatee might make a selection so as to leave only something of no value. *Arthur v. Muckinnon*, 11 Ch. D. 385.

Probably a gift of such houses as a legatee may select would not entitle the legatee to take all the testator's houses. See, too, *Kennedy v. Kennedy*, 10 H. 438.

Increase in value of specific legacy before the testator's death passes

6. In the case of a specific bequest, even before the Wills Act, any increase between the date of the will and the death of the testator in the value of the thing specifically given belonged to the legatee. Thus a gift of the amount of a bond carried the

accruing interest. *Harcourt v. Morgan*, 2 Kee. 274; *All Souls' Coll. v. Codrington*, 1 P. Wms. 597. Chap. XIV.

But if the description of the gift is such as to preclude the possibility of including it in any increase, such increase will not pass, as if the gift be of £300 due to me on a bond, interest will not pass. *Roberts v. Kuffin*, 2 Atk. 112; *Hawley v. Cutts*, 2 Freem. 24. to legatee,  
unless the  
description  
excludes it.

7. If there is a specific gift, as, for instance, of certain stock, and the testator at the date of his will possessed no such stock, but possessed other stock nearly answering the description, the latter will pass. *Door v. Geary*, 1 Ves. Sen. 255; *Dobson v. Waterman*, 3 Ves. 307 n.; *Gallini v. Noble*, 3 Mer. 691; *Pentecost v. Ley*, 2 J. & W. 207; *Mackinley v. Sison*, 8 Sim. 561; *Sheffield v. Von Donop*, 7 Ha. 42; *Quennell v. Turner*, 13 B. 240; *Ellis v. Eden*, 25 B. 543; *Trinder v. Trinder*, L. R. 1 Eq. 695; *Townend v. Townend*, 1 L. R. Ir. 180; *Palin v. Brookes*, 26 W. R. 877; see *Ex parte Kirke*, *In re Bennet*, 5 Ch. D. 800. Inaccurate  
description.

Under a gift of "money at the London and Westminster Bank," where the testator had an account only at the London and South Western Bank, her money at the latter bank was held not to pass. *In re Howes*; *Chabot v. Chabot*, W. N. 1882, 102.

8. If a testator makes a specific bequest of something which he has not at the date of the will, evidence is admissible to show how the mistake arose, and the fact that the thing in question has been exchanged for something else before the date of the will, will not avoid the legacy. In such a case the legatees are entitled to a sum equal in value to the specific legacy at the testator's death. *Selwood v. Mildmay*, 3 Ves. 306; *Lindgren v. Lindgren*, 9 B. 358; *Goodlad v. Barnett*, 1 K. & J. 341. Specific gift of  
something  
the testator  
has sold before  
the date of  
the will.

9. On the other hand, if the testator makes a specific gift of a thing he thinks he has, but never had, or of a thing which he intends to purchase, but does not, the gift is void. *Waters v. Wood*, 5 De G. & S. 717; *Evans v. Tripp*, 6 Mad. 91; *Millar v. Woodside*, 1 R. 6 Eq. 546. Gift of some-  
thing the  
testator thinks  
he has but  
has not.

10. If the testator bequeaths a specific thing, for instance, a brown horse, which he afterwards sells and replaces by another brown horse, there seems to be some doubt whether the latter Effect of sale  
by the testator  
of a thing  
specifically  
bequeathed

**Chap. XIV.** would pass by the effect of the 24th section of the Wills Act, which declares that a will shall be construed to speak from the death of the testator with reference to the real and personal estate comprised in it. The negative was held in *Re Gibson*, L. R. 2 Eq. 669; see *Sydney v. Sydney*, 17 Eq. 65; but see *Castle v. Fox*, 11 Eq. 542, 551.

and subsequent purchase of a similar thing.

It is at any rate clear that if the description in the will does not accurately apply to the fresh property, the latter will not pass. *In re Lane*; *Luard v. Lane*, 28 W. R. 764; 14 Ch. D. 856.

Confirmation by codicil.

11. If the testator sells the specific thing and buys another thing closely resembling the former, the subsequent confirmation of the will by a codicil will not have the effect of passing the fresh acquisition if the description in the will is not accurately appropriate to it. *Pattison v. Pattison*, 1 M. & K. 12; *Macdonald v. Irvine*, 8 Ch. D. 101; see *Pilkington's Trusts*, 6 N. R. 246; and see Chapter XVII. as to Ademption.

## CHAPTER XV.

## SPECIFIC, GENERAL, AND DEMONSTRATIVE LEGACIES.

IN the case of bequests of personalty it is often a question of Chap. XV.  
 difficulty whether a legacy is general or specific. A general General and  
 legacy is a legacy not of any particular thing, but of something specific  
 which is to be provided out of the testator's general estate. If legacies dis-  
 a particular fund is made primarily liable the legacy is demon- tinguished.  
 strative, but does not fail by the failure of the particular fund.  
 On the other hand, a specific legacy is a gift of a severed or  
 distinguished part of the testator's property. It does not abate  
 till after the general legacies are exhausted, but it is liable to  
 ademption by the testator in his lifetime.

The most common, though not the only kind of specific legacy,  
 is where the testator gives something which he possesses at the  
 date of the will.

In those cases there must be on the face of the will enough to  
 show that the testator is referring to something actually existing  
 at the time.

Thus a mere legacy of stock in round numbers, though the Legacy of  
 testator may possess the exact amount of stock, is not specific. stock is not  
*Partridge v. Partridge*, 9 Mod. 269; *Ca. t. Talb.* 226; *Simmons*  
*v. Vallance*, 4 B. C. C. 345; *Wilson v. Brownsmith*, 9 Ves.  
 180. specific.

Similarly a bequest of 5000*l.* in the South Sea Company's Nor of money  
 Stock is general, though the testator may have the exact amount in stock.  
 at the date of his will. *Purse v. Snaplin*, 1 Atk. 415; *Bronsdon*  
*v. Winter*, Amb. 57; *Bishop of Peterborough v. Mortlock*, 1 Bro.  
 C. C. 565; *Webster v. Hale*, 8 Ves. 410; *Robinson v. Addison*,  
 2 B. 515; *Macdonald v. Irvine*, 8 Ch. D. 101; see *Page v.*

Chap. XV. *Young*, 19 Eq. 501, where a gift of "the interest of 4500*l.*, money in the funds," was held specific.

As to whether the gift is of so much money to be invested in stock, or of stock of that value, see *Allan v. Kelly*, 7 W. R. 139.

But though the actual gift may not contain anything to show that it is specific, it may appear from the rest of the will that it is so.

Nor of stock  
to be trans-  
ferred.

A direction to transfer a certain amount of stock, or to pay it as soon as possible, will not make the legacy specific. *Sibley v. Perry*, 7 Ves. 522, 529; *Webster v. Hale*, 8 Ves. 410.

Gift on trust  
to sell is  
specific.

But a gift of stock generally to trustees on trust to sell, shows that the testator referred to specific stock. *Ashton v. Ashton*, Ca. t. Talb. 152; 3 P. W. 384.

Gift of rest of  
my stock  
makes pre-  
vious gifts  
of stock  
specific.

So where a testator, having given legacies of stock generally, then gives the rest of the stock "standing in my name," the earlier legacies must be specific. *Sleech v. Thorington*, 2 Ves. Sen. 560; see *Millard v. Bailey*, L. R. 1 Eq. 378.

Direction to  
purchase if  
the testator  
should not  
have sufficient  
stock to  
answer lega-  
cies of stock  
previously  
given.

A direction that if the testator should not have sufficient stock standing in his name to answer the legacies of stock previously given, the executors should purchase sufficient to make up the deficiency, shows that the testator meant to give something in existence at the time. *Townsend v. Martin*, 7 Ha. 471; *Fontaine v. Tyler*, 9 Pr. 94; *Queen's Coll. v. Sutton*, 12 Sim. 521.

The same is the case with a gift of 4000*l.*, capital stock, in the 3 per cent. Consolidated Bank Annuities, "or in whatsoever of the Government funds the same should be found invested." *Hosking v. Nicholls*, 1 Y. & C. C. 478.

Legacy of  
stock not in  
round num-  
bers where  
the testator  
has the exact  
amount.

If the legacy is not of stock in round numbers, but for instance of 2702*l.* 3*s.* Bank Annuities, and the testator has the exact amount, it would seem the argument in favour of specific gift is much stronger. *Jeffreys v. Jeffreys*, 3 Atk. 120; see *Robinson v. Addison*, 2 B. 515.

Gift of "my"  
stock.

A gift of "my" stock is specific. *Ashburner v. Maguire*, 2 B. C. C. 108; *Miller v. Little*, 2 B. 259.

Effect of  
Wills Act.

The effect of the Wills Act upon such a gift is to leave it specific, though it includes all the stock of the particular description belonging to the testator at his death. *Lady Lang-*

*dale v. Briggs*, 8 D. M. & G. 391; *Trinder v. Trinder*, L. R. 1 Chap. XV.  
Eq. 695; *Bothamley v. Sherson*, 20 Eq. 304.

It will not include stock which the testator has directed his brokers to purchase, but which is not in fact purchased till after his death. *Thomas v. Thomas*, 27 B. 537.

A gift of a part of a specific fund is specific. *Ford v. Fleming*, 1 Eq. Ca. Ab. 302, pl. 3; 2 P. W. 469; *Nelson v. Carter*, 5 Sim. 530; *Oliver v. Oliver*, 11 Eq. 506; *McClellan v. Clark*, 50 L. T. 616. Gift of part of specific fund.

So, too, a gift of a specific thing to be sold and divided in definite shares among several persons is a gift of specific legacies. *Page v. Leapingwell*, 18 Ves. 463; *Jeffrey's Trusts*, L. R. 2 Eq. 68.

Similarly a gift of money "out of" specific money, or of stock "out of" specific stock, is specific; as, for instance, money out of the dividends of stock, or money out of money invested in stock. *Drinkwater v. Falconer*, 2 Ves. Sen. 623; *Morley v. Bird*, 3 Ves. 628; *Hosking v. Nicholls*, 1 Y. & C. Ch. 478; *Badrick v. Stevens*, 3 B. C. C. 431; *Mullins v. Smith*, 1 Dr. & Sm. 204. Gift of money out of money.

On the other hand a gift of money out of stock is not specific, but demonstrative. *Kirby v. Potter*, 4 Ves. 748; *Deane v. Test*, 9 Ves. 146. Money out of stock.

If there is an independent gift of money, followed by a direction to pay it out of certain specific moneys, the legacy is demonstrative. *Roberts v. Pocock*, 4 Ves. 150; *Acton v. Acton*, 1 Mer. 178. Independent gift followed by a direction to pay out of a certain fund.

Similarly a gift of "5000*l.* or 50,000 rupees now vested in Company's bonds" is demonstrative. *Gillaume v. Adderley*, 15 Ves. 384.

Where the gift is not "out of" but "of" only, as 100*l.* of my funded property, it is more difficult to decide under which of the two last heads the gift falls. It seems, however, that if the testator estimates his stock in money, a gift of 100*l.* of my stock is specific. *Davies v. Fowler*, 16 Eq. 308; see *Brennan v. Brennan*, I. R. 2 Eq. 321. Gift of 100*l.* of my funded property.

But if he does not, and gives merely a gift of 100*l.* of my funded property, it is equivalent to a gift of money out of stock, and is therefore not specific. *Lambert v. Lambert*, 11 Ves. 607.

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Whether a gift  
is of money  
out of money,  
or of money  
out of stock

In some cases a difficulty may arise whether the testator meant money out of money or money out of stock.

It is clear that a gift of "2000*l.* Long Annuities now standing in my name" is specific, though the testator may only have had a much smaller sum. *Gordon v. Duff*, 28 B. 519; 3 D. F. & J. 662.

Whether it is a gift of Long Annuities to the amount of 2000*l.* a year or of 2000*l.* in gross seems doubtful, but probably this would depend on the state of the testator's property.

But if the gift is of "50*l.* of Bank Long Annuities Stock standing in my name," as such stock has no existence, and the gift might equally well be of a lump sum of 50*l.*, or of 50*l.* per annum, it is necessary to refer to the state of the testator's property to discover what he may have meant, and whether the gift is of 50*l.* per annum Long Annuities, or of the sum of 50*l.* to be paid out of Long Annuities. If the property is insufficient to satisfy the legacies, if construed as legacies of so much per annum Long Annuities, the legacies will be demonstrative legacies of so much money out of Long Annuities. *Boys v. Williams*, 3 Sim. 563; 2 R. & M. 688. See *A.-G. v. Grote*, 3 Mer. 316; 2 R. & M. 699; *Colpoys v. Colpoys*, Jac. 451, and *Fonnereau v. Poyntz*, 1 B. C. C. 471, as explained by Lord Eldon, 6 Ves. 400.

Legacy may  
be specific yet  
not subject to  
ademption.

It has been said that a specific legacy must be liable to ademption, and that therefore there could not be a specific legacy of a thing which the testator had not at the date of the will. See *Parrott v. Worsfold*, 1 J. & W. 594.

But it is now clear that a testator may make a specific gift of a thing of which he contemplates the acquisition, as for instance of the stock he may die possessed of. *Fountaine v. Tyler*, 9 Pr. 94; *Stewart v. Denton*, 4 Dougl. 219; 2 Chitty, 456; *Stephenson v. Dowson*, 3 B. 342; *Queen's Coll. v. Sutton*, 12 Sim. 521.

Whether a gift  
of a sum  
"invested" in  
a particular  
way is specific.

Whether the gift of a sum "invested" in a particular way is specific or not, depends on the question whether the testator meant the legatee to have the sum however invested, or whether the actual investment is the important part of the description.

Thus a gift of "the" 7000*l.* out on mortgage is clearly specific. *Gardner v. Hatton*, 6 Sim. 93. Chap. XV.

A bequest of a sum of money described as "now" invested in a certain way is probably specific. *Harrison v. Jackson*, 7 Ch. D. 339 (where *Le Grice v. Finch*, 3 Mer. 50, is disapproved); *McClellan v. Clark*, 50 L. T. 616. See *Sparrow v. Josselyn*, 16 B. 135.

A gift of "3000*l.* invested in Indian security" has upon the general language of the will been held to be demonstrative. *Mytton v. Mytton*, 19 Eq. 30; see *Bevan v. A.-G.*, 4 Giff. 361; 2 N. R. 52; see *McClellan v. Clark*, 50 L. T. 616.

But if the gift is of 300*l.*, or *thereabouts*, invested by the testatrix in a certain way, the words "or thereabouts" show that the investment is the important part of the gift. *Kermode v. Macdonald*, L. R. 1 Eq. 457; *ib.* 3 Ch. 584.

The following gifts have been held to be specific :

A gift of a particular debt, or of the money due on a particular security; as for instance of "my mortgage," or "the money now owing to me from A." *Innes v. Johnson*, 4 Ves. 568; *Sidebotham v. Watson*, 11 Ha. 170; *Ellis v. Walker*, Amb. 309; *Smallman v. Goolden*, 1 Cox. 329; *Gardner v. Hatton*, 6 Sim. 93; see *Sidney v. Sidney*, 17 Eq. 65. Examples of specific gifts.

A gift of the interest of money on a particular security. *Ashburner v. M'Guire*, 2 B. C. C. 108.

A gift of a sum of money "which" is secured in a particular way. *Chaworth v. Beech*, 4 Ves. 556; *Gillawme v. Adderley*, 15 Ves. 384; *Davies v. Morgan*, 1 B. 405.

A gift of money described as "being" on a particular security. *Nelson v. Carter*, 5 Sim. 530; *Ford v. Fleming*, 2 P. W. 469; S. C. 1 Eq. Cas. Ab. 302, pl. 3. See *Sparrow v. Josselyn*, 16 B. 135; *Smith v. Pybus*, 9 Ves. 566.

A legacy directed to be paid out of the amount of a debt due to the testator is a demonstrative legacy. *Vickers v. Pound*, 6 W. R. 580; 4 Jur. N. S. 543; 6 H. L. 885.

Upon the question, whether legacies given in supposed exercise of a power which the testator cannot exercise are specific, see *Walker v. Laxton*, 1 Y. & F. 557; *Re Young*; *Trye v. Sullivan*, 52 L. T. 754. Legacies in exercise of power.

Chap. XV.WHETHER A GIFT IS OF A SPECIFIC OR AN ALIQUOT  
PART OF FUND.

Whether a gift  
is of a specific  
or aliquot part  
of a fund.

A gift of a definite sum, part of a specific fund, is *prima facie* a gift of that precise sum, whether the fund turns out more or less, and not of an aliquot part of the fund. *Smith v. Fitzgerald*, 5 V. & B. 2; *Booth v. Alington*, 6 D. M. & G. 613. See *Kyles v. Drake*, 1 Ch. D. 217.

The testator may, however, show an intention that the legatees were to take aliquot parts of the fund. See *Chambers v. Chambers*, Mos. 333; *Cordell v. Noden*, 2 Vern. 148.

Upon similar principles, where a fund subject to a special power is appointed to objects and non-objects, the objects take only the shares they would have taken supposing the whole appointment good, and the rest goes as in default of appointment. *In re Furncombe's Trusts*, 9 Ch. D. 652.

## LEGACIES CONNECTED WITH LAND.

Devise of land  
is specific  
whether resi-  
duary or not.

A devise of lands, whether by specific description or by residuary devise, is specific. *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136.

Devise on  
trust to sell  
and divide.

A devise of land to be sold and divided among certain persons makes them specific legatees. *Page v. Leapingwell*, 18 Ves. 463; *Newbold v. Roadknight*, 1 R. & M. 677.

Gift of rent-  
charge.

The gift of a rent-charge or annuity to be paid out of land with powers of distress is specific. *Long v. Short*, 1 P. W. 403; *Davenhill v. Fletcher*, Amb. 244; *Creed v. Creed*, 11 C. & F. 491; *Patching v. Barnett*, 51 L. J. Ch. 74. See *Poole v. Heron*, 42 L. J. Ch. 348.

Of annual  
sum to be  
paid out of  
land.

But a mere gift of an annual sum or of a legacy to be paid out of real estate, will not be specific. *Mann v. Copland*, 2 Mad. 223; *Fowler v. Willoughby*, 2 S. & St. 354; *Colville v. Middleton*, 3 B. 570.

Legacy with  
mere charge  
on land.

Nor will a gift of a legacy or an annuity with a mere charge on land be specific. *Wilcox v. Rhodes*, 2 Russ. 452; *Davies v. Ashford*, 15 Sim. 42; *Paget v. Huish*, 1 H. & M. 663.

But a trust to raise a sum of money out of land, which sum is then given, is a specific legacy. *Welby v. Rockcliffe*, 1 R. & M. 571; *Dickin v. Edwards*, 4 Ha. 273. Chap. XV.  
Trust to raise  
a sum out of  
land.

So, too, a direction to pay a sum out of land, the only gift being in the direction to pay, is specific. *Spurway v. Glyn*, 9 Ves. 483.

In such a case the fact that the personalty is given after payment of legacies will not make the gift of a sum out of the proceeds of sale of realty demonstrative. *Rickets v. Ladley*, 3 Russ. 418. Effect of  
directions in  
the will on  
legacies in  
themselves  
specific.

Though, on the other hand, where a testatrix gave her real and personal estate on trust to pay the legacies thereafter given, a subsequent gift out of the proceeds of sale of realty was held demonstrative. *Hodges v. Grant*, 4 Eq. 140.

And where a legacy was given out of a fund which was not available till the death of A., but there was a direction that it was to be paid with the other legacies, it was held demonstrative. *Williams v. Hughes*, 24 B. 474.

#### WHETHER A GIFT IS SPECIFIC OR RESIDUARY.

A gift of the whole of the testator's personal estate may be specific. *Powell v. Riley*, 12 Eq. 175; *Roffey v. Early*, 42 L. J. Ch. 472. And the fact that the testator provides another fund for payment of debts affords a strong argument that the personal estate was intended to be specifically given. See the cases cited under the head of Exoneration of Personality. Whether a gift  
is specific or  
residuary.

But where a testator, after directing his executors to pay his debts, and giving legacies, gave all his personal estate to A., with certain exceptions, and gave the residue of his estate to his executors on certain trusts, the gift of the personalty was held not to be specific. *Robertson v. Broadbent*, 8 App. C. 812.

A mere enumeration of specific things in a residuary bequest will not make the gift of those things specific. *Taylor v. Taylor*, 6 Sim. 246; *Sutherland v. Cooke*, 1 Coll. 498; *Fielding v. Preston*, 1 De G. & J. 438. Enumeration  
of specific  
things.

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The cases in which it has been held that as between tenant for life and remainderman of a residue the fact of specific enumeration of certain things is a strong argument in favour of specific enjoyment by the former, are no authorities on the question whether the gift of those things is specific in the sense here discussed, though where the tenant for life has not been held entitled to specific enjoyment, the things specially mentioned are *à fortiori* not specific legacies. See this distinction well illustrated in *Fielding v. Preston*, 1 De G. & J. 438; see *post*, p. 190.

A direction that certain funds are in certain events to fall into the residue will not make the gift of those funds specific. *Lynes' Estate*, 8 Eq. 482.

A gift of residue including certain specified property will not make the gift of that property specific. *In re Tootal's Estate*, 2 Ch. D. 628; *Macdonald v. Irvine*, 8 Ch. D. 101.

Effect of words "as well as," "together with," &c.

If the specific things enumerated in the residuary gift are distinguished from the residue by such words as "as well as," or "together with," or "and also," the gift of them is specific. *Clarke v. Butler*, 1 Mer. 304; *Hill v. Hill*, 11 Jur. N. S. 806; *Langdale v. Esmonde*, 1 R. & Eq. 576; *Fitzwilliam v. Kelly*, 10 Ha. 266.

Possibly if the enumeration of specific things comes after the gift of the residue, the same result may follow. *Bethune v. Kennedy*, 1 M. & Cr. 114; *Mills v. Brown*, 21 B. 1.

On the other hand, a residue given "together with" certain specified property will not make the gift of that property specific, if its mention can be accounted for on the ground that the testator wished to except it from another gift in the will. *Fairer v. Park*, 3 Ch. D. 309.

The subject of residuary gifts will be found discussed in Ch. XX.

#### WHETHER A GIFT OF THE REST OR RESIDUE OF A SPECIFIED FUND IS SPECIFIC.

Whether a gift of the residue of a fund is specific.

When a testator disposes of parts of a specific fund, which he estimates at a certain amount, and then disposes of the residue,

and the fund turns out to be less than the estimated amount, the question arises whether the gift of residue was intended to be specific or not. In the former case, all the beneficiaries abate proportionately; in the latter, the loss must, in the first instance, be borne by the residuary legatee.

Where a testator gives the residue of a specific fund, and estimates that residue in money, the gift of the residue is specific. *Haslewood v. Green*, 28 B. 1; *Walpole v. Apthorp*, 4 Eq. 37.

So, too, where a testator estimates a specific fund in money, and gives definite portions of it, a gift of the rest is as specific as if he had stated it in figures. *Page v. Leapingwell*, 18 Ves. 463; *Walpole v. Apthorp*, 4 Eq. 37; *Miller v. Huddleston*, 6 Eq. 65; *Elwes v. Causton*, 30 B. 554; *Wright v. Weston*, 26 B. 429; see *Fee v. M'Manus*, 15 L. R. Ir. 31.

But if the fund is given subject to debts, the gift of the residue will not be specific. *Harley v. Moon*, 1 Dr. & S. 623; *Baker v. Farmer*, 3 Ch. 537.

So, too, though the testator estimates the fund in money, if the residue is given subject to or after payment of specific gifts, the gift of the residue is not specific, but will carry everything undisposed of, by reason of lapse or otherwise. *Carter v. Taggart*, 16 Sim. 423; *Harries' Trust*, Jo. 199; but see *Miller v. Huddleston*, 6 Eq. 65.

So, if the fund is estimated in figures, but the testator shows that he considers it fluctuating in amount by adding "or other the stock, funds, or securities of which the same may for the time being consist," the gift of the residue is not specific. *De Lisle v. Hodges*, 17 Eq. 440.

And though the fund is in fact definite in amount, if the testator merely describes it generally, without estimating it in figures, the gift of the residue is not specific. *Petre v. Petre*, 14 B. 197; *Vivian v. Mortlock*, 21 B. 252.

A gift of the residue of policy moneys following gifts of certain sums out of the policy moneys has been held to pass bonuses on the policy. *Corballis v. Corballis*, 9 L. R. Ir. 309.

See the chapter on Residuary Bequests, p. 179.

## CHAPTER XVI.

## CUMULATIVE AND SUBSTITUTIONAL LEGACIES.

**Chap. XVI.**

Legacies by  
same instru-  
ment of equal  
amount ;

I. LEGACIES of equal amount given by the same instrument are merely repetitions. *Holford v. Wood*, 4 Ves. 75 ; *Manning v. Thesiger*, 3 M. & K. 29 ; *Brine v. Ferrier*, 7 Sim. 549 ; *Early v. Benbow*, 2 Coll. 342 ; *Early v. Middleton*, 14 B. 453.

But there may be an intention to give both. *Barkenshaw v. Hodge*, 22 W. R. 484, where the gift was to trustees, and the legacies were introduced by the words "upon trust to pay," and "upon further trust to pay," &c.

Parol evidence would be admissible to show that the testator meant the legatee to have both legacies, such evidence being in support of the *primâ facie* meaning of the instrument. See *Hurst v. Beach*, 5 Mad. 351 ; *Hall v. Hill*, 1 Dr. & War. 94.

of unequal  
amount.

If the legacies are not equal the legatee is entitled to both. *Yockney v. Hansard*, 3 Ha. 622 ; *Curry v. Pile*, 2 B. C. C. 225 ; *Baylee v. Quin*, 2 Dr. & War. 116 ; *Adnam v. Cole*, 6 B. 353.

The rules with regard to cumulative legacies do not apply to the case of a pecuniary gift and a residue given to the same person. In such a case the legatee is entitled to both. *Kirkpatrick v. Bedford*, 4 App. C. 96.

Legacies by  
different  
instruments.

II. Legacies of equal, less, or greater amount, given by different instruments, as by will and codicil to the same person, are *primâ facie* cumulative. *Hooley v. Hatton*, 1 B. C. C. 390 n. ; *Lee v. Pain*, 4 H. 201, 216 ; *Roch v. Cullen*, 6 Ha. 531 ; *Cresswell v. Cresswell*, 6 Eq. 69 ; *Wilson v. O'Leary*, 12 Eq. 525 ; 7 Ch. 448 ; *Walsh v. Walsh*, 1 R. 4 Eq. 396.

Bequests of a share of residue by will and of a pecuniary legacy by a codicil are, of course, cumulative. *Gordon v. Anderson*, 4 Jur. N. S. 1097; *Ledger v. Hooker*, 18 Jur. 481. Chap. XVI.

It makes no difference that the codicil recites the gift by will. *Guy v. Sharp*, 1 M. & K. 589.

The fact that some legacies in the codicil are expressed to be in addition affords an argument that the others are substitutional, but is not conclusive. *Hooley v. Hatton*, 1 B. C. C. 390 n.; *Allen v. Callow*, 3 Ves. 289; *Mackenzie v. Mackenzie*, 2 Russ. 272; *Wray v. Field*, 2 Russ. 257; 6 Mad. 300; *Barclay v. Wainwright*, 3 Ves. 462.

The fact that a legacy given by a codicil is expressed to be in addition to a legacy given by the will does not show that it is not also in addition to a legacy by a prior codicil. *Spire v. Smith*, 1 B. 419; *Watson v. Reed*, 5 Sim. 431; see *Sawrey v. Rumney*, 5 De G. & Sm. 698.

III. It may, however, appear that the gift by the later instrument is intended to be substitutional. This may be shown: Legacies by different instruments will be substitutional—

1. By the form of the second instrument.

a. If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument. *Jackson v. Jackson*, 2 Cox, 35; *Kidd v. North*, 14 Sim. 463; 2 Ph. 91; *Tuckey v. Henderson*, 33 B. 174. If the instruments themselves are substitutional,

b. If the additional instrument recites that the testator has not time to alter his will, legacies given by it will be substitutional. *Russell v. Dickson*, 4 H. L. 293.

c. If the additional instrument is treated as explanatory of and to be incorporated into the will, the case may be brought within the rule as to additional gifts in the same instrument. *Duke of St. Albans v. Beauclerk*, 2 Atk. 636; *Fraser v. Byng*, 1 R. & M. 90.

And in the same way several testamentary papers may be so connected together as to be in fact one instrument. *Brine v. Ferrier*, 7 Sim. 549.

The same will be the case where there is a gift to a person

**Chap. XVI.** with a different gift written in the margin of the will. *Martin v. Drinkwater*, 2 B. 215.

or mere repetitions of each other,

2. From the contents of the second paper.

For instance, where the second instrument is not a codicil but a testamentary paper, and in effect makes the same dispositions as a prior testamentary paper. *Gillespie v. Alexander*, 2 S. & St. 145; *A.-G. v. Harley*, 4 Mad. 263; *Hemming v. Gurney*, 2 S. & St. 311; 1 Bl. N. S. 479.

So one codicil may appear to be a mere repetition of another. If, for instance, both are of the same date and contain the same provisions in all respects. *Whyte v. Whyte*, 17 Eq. 50.

So if, though not of the same date, the legatees are the same, and certain specific legacies, as well as the residue, are given by both. *Duke of St. Albans v. Beaucherk*, 2 Atk. 636; see *Cooté v. Boyd*, 2 B. C. C. C. 521; and *Campbell v. Earl of Radnor*, 1 B. C. C. 271; see *Roxburgh v. Fuller*, 13 W. R. 39.

Evidence is admissible to show that two codicils of different dates, but containing the same dispositions, were executed only as duplicates. *Hubbard v. Alexander*, 3 Ch. D. 738.

if the terms of the second gift show that it was meant to be substitutional.

3. It may appear from the character of the second gift itself that it is meant to be substitutional.

a. If the second gift only adapts the bounty to circumstances that have happened; as, for instance, the death of prior legatees. *Barclay v. Wainwright*, 3 Ves. 462; *Allen v. Callow*, 3 Ves. 289; *Osborne v. Duke of Leeds*, 5 Ves. 369.

b. If the second gift can be looked upon as explanatory of the prior gift. *Moggridge v. Thackwell*, 1 Ves. Jun. 473.

c. If by a codicil the testator revokes a portion of a prior gift, and then repeats the rest, so that the repetition may be explained as *ex abundanti cautela*. *Benyon v. Benyon*, 17 Ves. 34; *Hinchliffe v. Hinchliffe*, 2 Dr. & S. 96.

d. If the second gift is coupled with a gift of some specific thing already given, this shows it to be substitutional. *Currie v. Pye*, 17 Ves. 462; see *Lord Mayor of London v. Russell*, Finch, 290; explained 6 Ir. Ch. 131.

e. And generally it seems that the difference in the way in which the two gifts are given is in favour of their being cumulative. *Hodges v. Peacock*, 3 Ves. 735; *Lee v. Pain*, 4 Ha. 201.

Though, on the other hand, if the two gifts are of the same amount, but given to different trustees, the argument is the other way. *Benyon v. Benyon*, 17 Ves. 34. Chap. XVI.

*f.* The testator may show by a reference to a gift in one codicil as a sufficient provision that the gift so given was all the legatee was intended to have. *Robley v. Robley*, 2 B. 95.

IV. Gifts by different instruments of the same amount and expressed to be given from the same motive are substitutional. *Benyon v. Benyon*, 17 Ves. 34. Gifts of the same amount given from the same motive are substitutional.

It must, however, be clear that the testator is expressing a motive and not merely giving a description; thus, in the case of gifts of equal amount to a "servant," the term servant is merely descriptive. *Roch v. Cullen*, 6 Ha. 531; *Suisse v. Lowther*, 2 Ha. 424; *Wilson v. O'Leary*, 12 Eq. 522; 7 Ch. 448.

If, however, the gifts are not of the same amount they are cumulative. *Hurst v. Beach*, 5 Mad. 352.

V. Additional legacies are subject to the same incidents as the original legacy. Additional and substitutional gifts are subject to the same incidents as the original gift.

A gift in addition to or in lieu of a previous gift to the same legatee is subject to the same conditions as the previous gift with respect to vesting separate estate, the fund out of which it is payable, freedom from legacy duty, and provisions against lapse. *Leacroft v. Maynard*, 1 Ves. Jun. 279; 3 B. C. C. 233; *Crowder v. Clowes*, 2 Ves. Jun. 449; *Day v. Croft*, 4 B. 561; *Duncan v. Duncan*, 27 B. 392; *Earl of Shaftesbury v. Duke of Marlborough*, 7 Sim. 237; *Bristow v. Bristow*, 5 B. 289; *Cooper v. Day*, 3 Mer. 154; *Fisher v. Brierley*, 30 B. 265; *In re Wight*; *Knowles v. Sadler*, W. N. 1879, 20; *In re Boddington*; *Boddington v. Clairat*, 25 Ch. D. 685; *In re Benyon*; *Benyon v. Grieve*, W. N. 1884, 157.

It makes no difference that the legacy is not expressed to be in addition to the previous gift. *Johnson v. Lord Harrowby*, Johns. 425; 1 D. F. & J. 183.

The rule does not apply where a legacy is given to a person in lieu of a legacy to another legatee who has pre-deceased the testator. *Chatteris v. Young*, 2 Russ. 184.

Nor does it apply where the condition in question is limited by the will to legacies "hereinafter" given, and the additional

Chap. XVI. legacy is given by a codicil. *Bonner v. Bonner*, 13 Ves. 379; *Strong v. Ingram*, 6 Sim. 197.

It is not quite clear whether an additional or substitutional gift will be subject to the same executory gifts over as the original gift; it seems, however, that it will not. *Crowder v. Clowes*, 2 Ves. Jun. 449; *Alexander v. Alexander*, 5 B. 518; see *Donnellan v. O'Neill*, I. R. 5 Eq. 523.

An additional legacy given in terms which would give an absolute interest is not subject to limitations of the prior gift, which would cut it down to a life interest. *Haley v. Bannister*, 23 B. 336; *More's Trust*, 10 Ha. 171; *Mann v. Fuller*, Kay, 624; *Hill v. Jones*, 37 L. J. Ch. 465; see *Cookson v. Hancock*, 2 M. & Cr. 606; *Hargreaves v. Pennington*, 12 W. R. 1047.

## CHAPTER XVII.

### THE INCIDENTS ATTACHING TO SPECIFIC AND GENERAL LEGACIES.

#### I. ADEMPTION.

A SPECIFIC legacy is adeemed if it is afterwards converted by the testator into something else. *Ashburner v. M'Guire*, 2 B. C. C. 108; *Manton v. Tabois*, 33 W. R. 832. Chap. XVII.  
A specific legacy is adeemed if converted by the testator,

The conversion must be complete in the lifetime of the testator. A direction to sell not carried out till after the testator's death will not affect ademption. *Harrison v. Asher*, 2 De G. & S. 436.

A charge upon a specific bequest is gone if the specific bequest is adeemed. *Cowper v. Mantell*, 22 B. 228.

To effect ademption it is not necessary that the conversion should be the act of the testator. It is sufficient if the property is converted by some duly constituted authority, such as an order in lunacy. *Shaftsbury v. Shaftsbury*, 2 Ver. 747; *Jones v. Green*, 5 Eq. 555; *In re Freer*; *Freer v. Freer*, 22 Ch. D. 622.

Destruction of the property by *vis major*, such as the loss of a ship, has the same effect. *Durrant v. Friend*, 5 De G. & Sm. 343. or even *vis major*.

There will be no ademption where the specific thing has been converted without authority. *Basan v. Brandon*, 8 Sim. 171; *Taylor v. Taylor*, 10 Ha. 475; *Jenkins v. Jones*, L. R. 2 Eq. 323; see *Browne v. Groombridge*, 4 Mad. 495. But not by improper conversion.

A gift of specific stock standing in the names of trustees is adeemed by a change of investment. *Harrison v. Jackson*, 7 Ch. D. 339.

**Chap. XVII.** But a mere transfer of a thing specifically given from trustees to the testator will not be an ademption. *Dingwell v. Askew*, 1 Cox, 427; see *Amb.* 260; 3 B. C. C. 416; *Clough v. Clough*, 3 M. & K. 296; *Jones v. Southall*, 32 B. 31.

**Nor will a formal change.** Nor will a change made in it which leaves the thing to all intents the same as it was before; as, for instance, the conversion of shares into stock by a resolution of the company. *Oakes v. Oakes*, 9 Ha. 666; *Pilkington's Trusts*, 6 N. R. 246; *In re Loveman*; *Watson v. Watson*, W. N. 1879, 95; see *Partridge v. Partridge*, Cas. t. Talb. 226; *In re Lane*; *Luard v. Lane*, 14 Ch. D. 856; see *Longfield v. Bantry*, 15 L. R. Ir. 101.

**Bequests of share under will.** Upon the question whether a bequest of a share, to which the testator is entitled under the will of another person, would be adeemed if the share is paid to the testator after the date of his will, it seems that if the testator describes the share in such words as to show that he intends to give only a chose in action, the gift will be adeemed by the receipt of the share. See *Harrison v. Jackson*, 7 Ch. D. 339, where *Clark v. Browne*, 2 Sm. & G. 524, is disapproved.

On the other hand, if the description employed by the testator does not refer to the share as a chose in action, the gift will not be adeemed, merely because the testator has received the share, if he invests it and keeps it apart from the rest of his property. *Lee v. Lee*, 27 L. J. Ch. 824; *Morgan v. Thomas*, 6 Ch. D. 176; see *Moore v. Moore*, 29 B. 496.

**Effect of change of security.** And it would seem that a bequest of certain trust funds "and the securities upon which they may be invested" would not be adeemed by a mere change of security, though it will if the testator receives the money and lends it on security for his own purposes. *Jones v. Southall*, 32 B. 31.

**Appointment of personalty,** Where the donee of a general power appoints a fund of personalty by a specific description the appointment is not adeemed by a subsequent change of investment. *In re Johnstone's Settlement*, 14 Ch. D. 162.

**of realty.** As to whether an appointment of real estate under a power is adeemed by the subsequent sale of the real estate under provisions contained in the settlement creating the power, see

*Gale v. Gale*, 21 B. 349; *Blake v. Blake*, 49 L. J. Ch. 393; 28 Chap. XVII W. R. 647; 15 Ch. D. 481.

The confirmation of a will by a codicil will not revive a legacy which has been adeemed in the meantime. *Drinkwater v. Falconer*, 2 Ves. Sen. 626; *Monck v. Monck*, 1 Ba. & B. 306; *Cowper v. Mantell*, 23 B. 223; *Hopwood v. Hopwood*, 7 H. L. 728; see *ante*, p. 98.

In the same way the specific gift of a debt due to the testator and afterwards received in whole or part by him, whether the debtor pays it voluntarily or not, is adeemed *pro tanto*. *Ashburner v. M'Guire*, 2 B. C. C. 108; *Fryer v. Morris*, 9 Ves. 360; *Humphries v. Humphries*, 2 Cox, 185; *Makeoun v. Ardagh*, I. R. 10 Eq. 445; *Aston v. Wood*, 43 L. J. Ch. 715; *In re Bridle*, 4 C. P. D. 336.

It is immaterial that the amount of the debt is placed by the testator to a separate account. *In re Bridle, supra*.

Where a particular sum owing to the testator is bequeathed and afterwards received by him, a fresh debt subsequently incurred by the same debtor will not pass, at any rate, if the sums are not precisely the same. *Gardner v. Hatton*, 6 Sim. 93; *Sidney v. Sidney*, 17 Eq. 65.

Where things in a particular place, such as a house, are given and are afterwards removed to another place, the question is, whether the place is a substantive part of the bequest or whether it is merely descriptive of the things the testator refers to.

In the latter case the removal of the things to another place is immaterial. *Cunningham v. Ross*, 2 Cas. t. Lee, 272; *Norris v. Norris*, 2 Coll. 719; *Blagrove v. Coore*, 27 B. 138; *Norreys v. Franks*, I. R. 9 Eq. 18.

Similarly a bequest of furniture in a house will pass furniture intended to be placed there. *Rawlinson v. Rawlinson*, 3 Ch. D. 302; but see *Lord Brooke v. Earl of Warwick*, 2 De G. & Sm. 425.

If, however, the bequest of the things is connected with the enjoyment of the house, both being given to the legatee; or if the gift is of such furniture as may be in a particular place at the testator's decease, a permanent removal works an ademp-

**Chap. XVII.** tion. *Colleton v. Garth*, 6 Sim. 19; *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Heseltine v. Heseltine*, 3 Mad. 276; *Green v. Symonds*, 1 B. C. C. 129 n.; *Spencer v. Spencer*, 21 B. 548.

Temporary removal will not adeem.

But a removal for a temporary purpose will not have this effect. *Domville v. Baker*, 32 B. 604; *Chapman v. Hart*, 1 Ves. Sen. 271; *Norreys v. Franks*, 1 R. 9 Eq. 18; *Land v. Devaynes*, 4 B. C. C. 537; *Lord Brooke v. Earl of Warwick*, 2 De G. & S. 425; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

## II. CHANGE OF INTEREST OF TESTATOR.

Effect of change in the testator's interest after the date of the will.

A somewhat different question arises where the nature of the testator's interest in the subject matter of a bequest alters between the date of the will and his death; if, for instance, the testator subsequently acquires the reversion of leaseholds given by his will.

Acceptance of a new lease.

Before the Wills Act a specific bequest of a lease, unless the testator being *cestui que trust* gave his interest in the lease which includes the right to the benefit of a renewal by the trustee, or expressly gave his future interest, was adeemed by the acceptance of a new lease or the acquisition of the reversion. *Carte v. Carte*, 3 Atk. 174; *James v. Dean*, 11 Ves. 383; 15 Ves. 238; *Marwood v. Turner*, 3 P. Wms. 163; *Abney v. Miller*, 2 Atk. 593; *Capel v. Girdler*, 9 Ves. 509; *Slatter v. Noton*, 16 Ves. 197.

In the same way, the purchase of the equity of redemption revoked a devise of the mortgaged estate. *Strode v. Lady Falkland*, 2 Vern. 621; *Yardley v. Holland*, 20 Eq. 428.

And a general gift of lands or a house in which the testator had a chattel interest was *prima facie* a gift of that interest and subject to ademption in the same way. *Rudstone v. Anderson*, 2 Ves. Sen. 418; *Hone v. Medcraft*, 1 B. C. C. 261; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Colegrave v. Manby*, 6 Mad. 72; 2 Russ. 238.

Effect of the Wills Act.

It seems, however, that the 24th section of the Wills Act applies to such a case, and since that statute the subsequent acquisition of the reversion will not be an ademption of the

gift. *Struthers v. Struthers*, 5 W. R. 809; *Cox v. Bennett*, 6 Eq. 422; not following *Emuss v. Smith*, 2 De G. & Sm. 722; and see *Miles v. Miles*, L. R. 1 Eq. 462; *Wedgwood v. Denton*, 12 Eq. 290; *Leckey v. Watson*, I. R. 7 C. L. 157; *Saxton v. Saxton*, 13 Ch. D. 359. Chap. XVII.

Where the testator being entitled to a third share of a business bequeathed his share and interest in the business, and afterwards acquired the whole business, the whole business was held to pass. *In re Russell*; *Russell v. Chell*, 19 Ch. D. 432. Share of business.

### III. RIGHT OF RETAINER.

It seems doubtful whether a specific legacy can be subject to the executor's right of retainer for a debt due from the legatee to the estate. *Harvey v. Palmer*, 4 De G. & S. 425. Right of retainer against specific legatee.

In the case of a general legacy the executor is entitled to retain so much of the legacy as may be sufficient to pay a debt due to the testator from the legatee, even though the debt may be barred by statute. *Courtenay v. Williams*, 3 H. 539; *In re Cordwell's Estate*; *White v. Cordwell*, 20 Eq. 644. Against general legacy.

Costs of administration directed to be paid by a legatee are within the same rule; and the assignee of a legatee takes subject to the executor's rights against the legatee. *In re Knapman's Estate*; *Knapman v. Wreford*, 18 Ch. D. 300.

In the case of a legatee who becomes bankrupt after the testator's death, the executor is, it seems, entitled to retain the debt. But if he proves in the bankruptcy the right of retainer is gone. *Stammers v. Elliott*, 3 Ch. 195; *Armstrong v. Armstrong*, 12 Eq. 614. Bankrupt legatee.

In the case of a legatee bankrupt at the death of the testator there is no right to retain the debt out of the legacy, since there was never a time at which the same person was entitled to receive the legacy and liable to pay the whole debt. Dividends payable under the bankruptcy, if any have been declared, may be retained. *Cherry v. Boulton*, 2 Kee. 319; 4 M. & Cr. 442; *In re Hodgson*; *Hodgson v. Fox*, 9 Ch. D. 673; *In re Orpen*; *Beswick v. Orpen*, 16 Ch. D. 202. Debt due from husband of legatee.

A debt due from the husband of a legatee may of course be

**Chap. XVII.** retained out of so much of the legacy as is payable to the husband after the legatee's equity to a settlement is satisfied. *M'Mahon v. Burchell*, 5 H. 325.

Assignment  
under Malins'  
Act.

Where a married woman assigns her reversionary interest under Sir R. Malins' Act (20 & 21 Vict. c. 57), there is no right as against the assignee to retain a debt due from the husband. *In re Batchelor*; *Sloper v. Oliver*, 16 Eq. 481.

It would seem that if A. is the executor of B. and C., C. being B.'s residuary legatee, a sum due from D. to B. might be retained out of the share to which D. is entitled in C.'s estate. *Stammers v. Elliott*, 3 Ch. 195.

The right of retainer is gone as soon as the executors have set apart and invested a sum to meet a legacy. *Ballard v. Marsden*, 14 Ch. D. 374.

Claims in  
*autre droit*.

Cross demands existing in different rights cannot be set off. Thus a debt due to the executor in his personal capacity cannot be retained out of a legacy. *M'Mahon v. Burchell*, 2 Ph. 127; see *Stammers v. Elliott*, 3 Ch. 195; *Middleton v. Pollock*; *Ex parte Nugee*, 20 Eq. 29.

#### IV. EXONERATION OF SPECIFIC LEGACIES.

Exoneration  
of specific  
legacies from  
debts and  
liabilities of  
testator.

##### 1. Liabilities created by testator.

A specific legatee has a right to have his specific legacy freed from the debts and liabilities of the testator existing at his decease. *Stewart v. Denton*, 4 Doug. 219; S. C. 2 Chit. 456; *Barry v. Harding*, 1 J. & Lat. 489; *Fitzwilliams v. Kelly*, 10 Ha. 266.

So if the testator has pledged the legacy, whether for his own debt or not, the legatee is entitled to compensation. *Knight v. Davis*, 3 M. & K. 358; *Bothamley v. Sherson*, 20 Eq. 304.

##### 2. Liabilities incidental to the thing.

With regard to payments on specific legacies which become due after the testator's decease, the distinction is between charges created by the testator and charges incident to the chattel.

Rent falling  
due after the

Thus rent or fines falling due after the testator's death are

payable by the legatee. *Fitzwilliams v. Kelly*, 10 Ha. 266; see *Chap. XVII.*  
*Hawkins v. Hawkins*, 13 Ch. D. 470.

Under a gift of a leasehold house "free of all outgoing and payments except the annual and other rent" the legatee was held entitled to have the outgoing cleared only up to the time of taking possession. *In re Taber*; *Arnold v. Kayess*, 46 L. T. 805; 80 W. R. 883; 51 L. J. Ch. 721.

As to calls upon shares, the cases are somewhat conflicting; but on the whole it seems if the testator's estate does not remain liable, the liability must be borne by the specific legatee. *Armstrong v. Burnet*, 20 B. 424.

And even if the testator's estate remains liable, but the liability is such that neither the testator nor his estate might ever have become chargeable with it, such as the liability on shares in a banking or insurance company, the specific legatee must bear it. *Armstrong v. Burnet*, *supra*; *Adams v. Ferrick*, 26 B. 384; see *Wright v. Warren*, 4 De G. & S. 367; *Fitzwilliams v. Kelly*, 10 H. 266; *In re Box*, 12 W. R. 67; 1 H. & M. 552.

And it seems that calls on railway shares made after the testator's decease must be borne by the specific legatee. *Day v. Day*, 1 Dr. & Sm. 261.

It would seem that *Blount v. Hopkins*, 7 Sim. 43; *Jacques v. Chambers*, 4 Rail. Cases, 499; and *Clive v. Clive*, Kay 600, would not now be followed, unless the two former can be supported on the ground that the testator had covenanted to pay the calls within a given time.

A direction to pay calls due upon shares for the time being constituting part of the testator's residuary estate has been confined to calls upon shares accepted by the testator at the time of his death. *Bevan v. Waterhouse*, 3 Ch. D. 752.

Where a testator, being joint tenant at law with his partner of leasehold property employed for partnership purposes, bequeathed to the partner all his share of the leasehold premises, it was held that the partner was entitled to the moiety only after the partnership debts had been paid. *Farquhar v. Hadden*, 7 Ch. 1.

testator's  
death.

Calls on  
shares must  
be paid by  
legatee.

Chap. XVII.

## V. EXONERATION OF MORTGAGED PROPERTY.

Exoneration  
of mortgaged  
property in  
cases before  
Locke King's  
Act.

In cases not affected by Locke King's Act, 17 & 18 Vict. c. 113, amended by 30 & 31 Vict. c. 69, and 40 and 41 Vict. c. 34, the devisee of mortgaged lands, the mortgages upon which have been either created or adopted by the testator, is entitled in the absence of a contrary intention, to have the mortgage paid off out of the first four classes of property in the administration of assets; and as regards the fourth, viz., real estate charged with debts generally, if the mortgaged lands are themselves included in the general charge of debts, they must bear a proportionate part of the mortgage. *Middleton v. Middleton*, 15 B. 450; *Harper v. Munday*, 7 D. M. & G. 369.

Pecuniary legacies are not applicable to exonerate mortgaged property, whether freehold or leasehold. *Lutkins v. Leigh*, Cas. t. Talb. 53; *Johnson v. Child*, 4 Ha. 87.

Similarly, where mortgaged lands descend, the heir is entitled to exoneration out of the first two classes of property. *Hill v. Bishop of London*, 1 Atk. 621; *Chester v. Powell*, 7 Jur. 389; *Young v. Furse*, 20 B. 380.

Devise of  
mortgaged  
lands sub-  
ject to the  
mortgage will  
not exonerate  
the personalty.

A devise of lands expressly subject to the mortgage thereon will not exonerate the personalty, the words "subject to the mortgage" being held merely descriptive. *Duke of Ancaster v. Meyer*, 1 Bro. C. C. 454; *Bickham v. Crutwell*, 3 M. & Cr. 763.

Direction to  
pay off certain  
mortgage.

A direction that a mortgage on a certain estate is to be paid off will not exonerate the personalty from paying off mortgages on other estates. *In re Bull*; *Catty v. Bull*, 49 L. T. 592.

Nor will a direction that part of the mortgaged land is to bear a larger proportion of the mortgage than other part. *Goodwin v. Lee*, 1 K. & J. 377.

Charge of  
mortgages on  
the mortgaged  
land in a dis-  
tinct sentence.

But it would seem that a charge of the mortgage debt upon the mortgaged land in a distinct sentence will make the land primarily liable. *Evans v. Cockeram*, 1 Col. 428. See *Hancox v. Abbey*, 11 Ves. 179.

Locke King's  
Act.

The law on this subject has been altered by Locke King's Act, 17 & 18 Vict. c. 113, which enacts that "when any person

shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made, or to be made before the 1st of January, 1855." Chap. XVII.

The Act 30 & 31 Vict. c. 69, extends and defines the meaning of the words "contrary or other intention" in the case of testators dying after the 31st of December, 1867, and by section 2 declares that in the construction of the principal Act the word mortgage shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator.

By the Act 40 & 41 Vict. c. 34, it is enacted as follows:

1. The Acts mentioned in the schedule hereto (17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69) shall, as to any testator or intestate dying after the 31st December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any

Chap. XVII. other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.

2. This Act shall not extend to Scotland.

#### WHAT PERSONS ARE WITHIN THE ORIGINAL ACT.

What persons  
are within the  
Act.

The Crown taking personalty in default of next of kin is within the words "persons claiming through or under the deceased person" in Locke King's Act. *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

The heir taking by descent, owing to lapse or otherwise, from a person dying after the 31st December, 1854, is not entitled to exoneration under the exception in the proviso in the original Act, though the will may be made before the 1st January, 1855. *Power v. Power*, 8 Ir. Ch. 340; *Piper v. Piper*, 1 J. & H. 91; *Nelson v. Page*, 7 Eq. 25.

On the other hand, a devisee taking under a will made before the 1st January, 1855, is within the proviso, though the will may have been republished after that date. *Rolfe v. Perry*, 3 D. J. & S. 481.

#### WHAT PROPERTY IS WITHIN THE ORIGINAL ACT.

Copyholds.

Copyholds are within Locke King's Act. *Piper v. Piper*, 1 J. & H. 91.

Land on trust  
for sale.

Land devised on trust for sale, and coming to the testator as personalty, is not within that Act. *Lewis v. Lewis*, 13 Eq. 219.

Leaseholds.

Leaseholds are not within the original Act or the Act of 1867. *Soloman v. Soloman*, 12 W. R. 540; 33 L. J. Ch. 473; *Gael or Gall v. Fenwick*, 22 W. R. 211; 43 L. J. Ch. 178; *In re Wormsley's Estate*; *Hill v. Wormsley*, 4 Ch. D. 665.

The Act applies where real and personal estate are directed to be converted, and the proceeds made a mixed fund. *Elliott v. Dearsley*, 16 Ch. D. 322. Chap. XVII.

If the mortgage includes freeholds and leaseholds, the mortgage must be apportioned between the freeholds and leaseholds according to their values at the testator's death, and the amount apportioned in respect of the leaseholds will be discharged out of the personal estate or out of the fund appointed for payment of debts. *Gall v. Fenwick*, *supra*.

Curiously enough leaseholds are not specifically named in the Act of 1877, but as that Act extends to "land or other hereditaments of whatever tenure," a term wide enough to include leaseholds, and the devisee or legatee or heir is not to be entitled to exoneration, it would seem that the Act extends to leaseholds.

#### WHAT MORTGAGES ARE WITHIN THE ORIGINAL ACT.

Mortgages by deposit of title deeds, with or without a memorandum of agreement to execute a legal mortgage, are within the Act. *Pembroke v. Friend*, 1 J. & H. 132; *Davis v. Davis* 24 W. R. 962. Mortgage by deposit.

So is a deposit of deeds, with a memorandum, though expressed to be only a collateral security. *Coleby v. Coleby*, L. R. 2 Eq. 803.

But a mere general charge by a testator on real estate in aid of his personalty is not within the Act. *Hepworth v. Hill*, 30 B. 476; see the Act of 1877, *supra*.

Nor is a covenant to pay off a mortgage on land not belonging to the covenantor. *Day v. Day*, 14 W. R. 261.

A lien for unpaid purchase money upon lands purchased by a testator is, by 30 & 31 Vict. c. 69, s. 2, declared to be within the original Act, see *In re Cockcroft*; *Broadbent v. Groves*, 24 Ch. D. 94. Lien for purchase-money.

The lien for unpaid purchase money must be borne by the land, though the testator devises only the legal estate without disposing of the beneficial interest. *Dowdall v. M'Cartan*, 5 L. R. Ir. 313, 642.

**Chap. XVII.** The heir of an intestate dying before the 31st December, 1877, is entitled to have a lien for unpaid purchase money upon lands of the intestate discharged out of the personal estate, the case not being provided for by the Act of 1867. *Harding v. Harding*, 13 Eq. 493.

The heir of an intestate dying after the 31st December, 1877, is not entitled to have a lien for unpaid purchase money discharged. See the Act of 1877, *supra*, p. 121.

#### WHAT IS A CONTRARY INTENTION WITHIN THE ACT.

Direction to pay debts.

It was decided that a general direction to pay debts, or to pay debts out of the estate, did not show the contrary intention required by Locke King's Act. *Pembroke v. Friend*, 1 J. & H. 132; *Brownson v. Lawrance*, 6 Eq. 1; *Woolstencroft v. Woolstencroft*, 2 D. F. & J. 347.

Whether the fact that mortgaged lands are devised in strict settlement would make any difference seems doubtful, at any rate it would not where the testator himself contemplates the mortgages as subsisting from generation to generation. *Coot v. Lowndes*, 10 Eq. 376.

Direction to pay debts out of the personal estate or a particular fund.

But a direction, that the debts are to be paid out of the personal estate or out of any particular fund, was held to show a contrary intention. *Moore v. Moore*, 1 D. J. & S. 602; *Eno v. Tatham*, 3 D. J. & S. 443; 32 L. J. Ch. 311; *Mellish v. Vallins*, 2 J. & H. 194; *Newman v. Wilson*, 31 B. 33; *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *ib.* 4 H. L. 506. See *Allen v. Allen*, 30 B. 395; *Porcher v. Wilson*, 12 W. R. 1001.

The Amendment Act, 30 & 31 Vict. cap. 69.

By the 30 & 31 Vict. c. 69, however, it is enacted that in the wills of testators dying after the 31st December, 1867, a declaration that debts are to be paid out of the personal estate is not to be deemed a declaration of intention to exonerate mortgaged lands.

Under this Act, "if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to them;" per Giffard, V.-C., in *Nelson v.*

Page, 7 Eq. 25, p. 28. See *Allen v. Allen*, 30 B. 395; *Greated* Chap. XVII.  
v. *Greated*, 26 B. 621.

In cases governed by the Act of 1867, a direction to pay debts out of a mixed fund of realty and personalty, or a direction to pay debts out of the personal estate in exoneration of the real estate, or a charge of debts on certain real estate in aid of the personal estate and in exoneration of the other real estate, will not entitle the devisee of mortgaged lands to have the mortgage discharged. *Gael or Gall v. Fenwick*, 22 W. R. 211; 43 L. J. Ch. 178; *In re Rossiter*; *Rossiter v. Rossiter*, 13 Ch. D. 355; *In re Newmarch*; *Newmarch v. Storr*, 9 Ch. D. 12; *Elliott v. Dearsley*, 16 Ch. D. 322; and see the Act of 1877, *supra*, p. 121.

Direction to pay debts.

Where part of lands subject to a mortgage is specifically devised, and the rest given to the residuary devisee, or where a life interest is given, and the remainder is given to the residuary devisee, there is no evidence of an intention, that the mortgage is to be borne by the residuary devisee. *Gibbins v. Eyden*, 7 Eq. 371; *Sackville v. Smith*, 17 Eq. 153, overruling *Brownson v. Lawrance*, 6 Eq. 1.

Specific devisee of part of land subject to a mortgage is not entitled to exoneration.

The further question may arise whether, supposing the testator directs the mortgages to be paid out of a specific fund, the devisees will be entitled to exoneration if that fund is insufficient.

Direction to pay mortgages out of insufficient fund.

It would seem, where the fund is a fund of personalty, the devisees will not be entitled to exoneration beyond the value of the fund. *Rodhouse v. Mold*, 13 W. R. 854; 35 L. J. Ch. 67.

On the other hand, it is laid down by Lord Romilly in *Allen v. Allen*, 30 B. 403, that where a mortgage on Whiteacre is directed to be paid out of Blackacre, the mortgagee is entitled to exoneration out of the personal estate in the first place, as the Act only directs that the mortgaged land shall be primarily liable, and does not alter the ordinary rules of administration where there is an intention that it should not be so liable. But *quære* whether the decision above cited and this dictum are reconcilable; and see *Smith v. Moreton*, 37 L. J. Ch. 6.

It would seem, that where mortgages are directed to be paid and the personalty is insufficient to pay them, the several lands

How far mortgaged lands applic-

- Chap. XVII.** bear only the mortgages secured upon them, and not a proportionate share of all the mortgages. *Wisden v. Wisden*, 5 Jur. N. S. 455.
- able in payment of mortgages. Mortgaged estate devised to different persons. Where different portions of an estate subject to a mortgage are devised to different persons, the devisees must contribute rateably to pay the mortgage according to the value of the portions devised to them. *In re Newmarch; Newmarch v. Storr*, 9 Ch. D. 12.
- Realty and personalty mortgaged together. The same rule applies if the mortgage comprises real and personal property. The devisees of the land and the legatees of the personalty contribute rateably. *Trestrail v. Mason*, 7 Ch. D. 655.
- Collateral mortgage. Where several properties are mortgaged contemporaneously by different deeds, the fact that one of the mortgages is called a collateral security will not throw the mortgage debt primarily on the property comprised in the other mortgage. *Early v. Early*, 16 Ch. D. 214; *In re Athill*, 16 Ch. D. 211.
- Successive mortgages. Where a testator mortgages certain land and then mortgages other land for the same debt and further advances, the whole amount due will, as between the devisees of the different lands, be treated as one debt, and must be borne rateably by the various properties unless it is shown that the land first charged was intended to be the primary security for the amount advanced prior to the second mortgage. *Leonino v. Leonino*, 10 Ch. D. 460, where the cases of *Lipscomb v. Lipscomb*, 7 Eq. 501, and *De Rochefort v. Dawes*, 12 Eq. 540, are discussed; and see *Stringer v. Harper*, 26 B. 33; *Evans v. Wyatt*, 31 B. 217.
- Where a portion of lands subject to a charge is conveyed by a voluntary deed, containing only a covenant for further assurance, and the rest is devised, the lands conveyed and devised must bear the charge rateably. *Ker v. Ker*, 1 R. 4 Eq. 15.
- Property subject to a general lien for a debt in respect of which the testator has given a specific security does not contribute rateably with the property comprised in the security to payment of the debt. *In re Dunlop; Dunlop v. Dunlop*, 21 Ch. D. 583.

VI. RENTS, PROFITS, AND INCOME.

1. A present devise of lands being specific carries the rents and profits from the death of the testator.

Devisee is entitled to rents from the testator's death.

But a devise of all the testator's interest in an estate when recovered will not carry rents accrued due prior to his death. *Scott v. Best*, 6 L. R. Ir. 7.

Where the devise is of rents due prior to the testator's death, derived from property of which the testator is tenant for life, interest upon charges must be deducted, unless the charges are vested in the testator. *Lindsay v. Earl of Wicklow*, 1 R. 6 Eq. 72.

2. A specific bequest, if vested, carries all the income and profits which may accrue upon it after the testator's death. *Clive v. Clive*, Kay, 600; *Maclaren v. Stainton*, 3 D. F. & J. 202; and see *Carron Company v. Hunter*, L. R. 1 H. L. Sc. 362.

Specific bequest.

The question sometimes arises what are profits accruing after the death of the testator.

What are profits.

A bonus or dividend on shares declared before the testator's death, but not payable till afterwards, will not pass with the shares. *Lock v. Venables*, 27 B. 598; *De Gendre v. Kent*, L. R. 4 Eq. 283.

Bonus on shares.

Nor will the profits of a partnership, declared after the testator's death, for a period ending in his lifetime. *Ibbotson v. Elam*, L. R. 1 Eq. 188; *Browne v. Collins*, 12 Eq. 586.

Partnership profits.

On the other hand, a debt is to be considered as the profits of the year in which it is paid. *Maclaren v. Stainton*, 3 D. F. & J. 202.

Debt.

3. Since the Apportionment Act, 38 & 34 Vict. c. 35, rents, annuities, dividends and other periodical payments in the nature of income are to be considered as accruing from day to day, and are apportionable where the testator dies between two rent days.

Apportionment Act.

The 5th section defines dividends as including all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, whether such payments shall be usually made or declared at any fixed times or otherwise; but they do not include payments in the nature of a return or reimbursement of capital.

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Will before  
Act.

The Act has been held to apply to a will executed before and confirmed by a codicil executed after the passing of the Act. *Hasluck v. Pedley*, 19 Eq. 271; *Constable v. Constable*, 48 L. J. Ch. 621; see *Roseingrave v. Burke*, I. R. 7 Eq. 187.

It has also been held to apply to the will of a testator dying before the Act came into operation. *In re Cline's Estate*, 18 Eq. 213; *Patching v. Barnett*, 28 W. R. 886; *Lawrence v. Lawrence*, 26 Ch. D. 795; see *Jones v. Ogle*, 8 Ch. 192.

The Act applies to specific as well as to residuary devises. *Capron v. Capron*, 17 Eq. 288; *Pollock v. Pollock*, 18 Eq. 329, overruling *Whitehead v. Whitehead*, 16 Eq. 528; see *A.-G. v. Daly*, I. R. 8 Eq. 595.

Profits of  
private  
partnership.

The profits of a private trading partnership, or of a business belonging to the testator, are not apportionable under the Act. *Jones v. Ogle*, 8 Ch. 192; *In re Cox's Trusts*, 9 Ch. D. 159.

What is a  
public com-  
pany.

A public company within the meaning of the Act need not necessarily be an incorporated company. See *In re Griffith*; *Carr v. Griffith*, 12 Ch. D. 655.

A bonus or surplus profits distributed among the shareholders of a public company once in five years is apportionable under the Act. *In re Griffith, supra*.

In determining what is corpus and what interest the Apportionment Acts apply as well between tenant for life and remainderman as where in certain events an absolute interest is cut down to a life interest. *Clive v. Clive*, 7 Ch. 433.

The Act does not apply where a testator directs interest to be paid on a legacy till it is appropriated and the executors purchase stock on which five months' interest has accrued. In such a case the tenant for life is entitled to interest up to the date of the investment and to the whole dividend. *In re Clarke*; *Barker v. Perowne*, 18 Ch. D. 160.

Future devise  
does not carry  
the inter-  
mediate rents.

4. A future devise of lands, whether the fee is vested in trustees or is in abeyance, does not carry the intermediate rents and profits, which pass either under the residuary clause, if there is one, or to the heir. *Hopkins v. Hopkins*, Ca. t. Talb. 45; *Hopkins v. Hopkins*, 1 Ves. Sen. 268; *Duffield v. Duffield*, 3 Bl. N. S. 260; *Percival v. Percival*, 9 Eq. 386; *In re Eddel's*

*Trust*, 11 Eq. 559; see, however, *Best v. Donmall*, 40 L. J. Ch. Chap. XVII. 160.

The intermediate rents are undisposed of till the actual birth of the devisee. *Richards v. Richards*, Jo. 754; *Mowlem's Trust*, 18 Eq. 9; see *Rawlins v. Rawlins*, 2 Cox, 425; *Goodale v. Gawthorne*, 2 W. R. 680; 2 Sm. & G. 375.

5. A contingent specific bequest of chattels real or personalty will not carry the intermediate profits except perhaps in the case of a person who would be entitled to interest on a general legacy from the testator's death. See *post*, p. 133, *et seq.*; *Holmes v. Prescott*, 12 W. R. 636; *Guthrie v. Walrond*, 22 Ch. D. 573; see *Wright v. Warren*, 4 De. G. & S. 367. Contingent specific bequests.

6. A future residuary devise, or a devise subject to prior limitations which may or may not take effect, will not carry intermediate rents and profits. *Hodgson v. Earl of Bective*, 1 H. & M. 376; 12 W. R. 625; 10 H. L. 656; *Wade Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D. 374; overruling *Sidney v. Wilmer*, 4 D. J. & S. 84. Future residuary devise.

7. A contingent residuary gift of personalty carries the intermediate interest during the period allowed for accumulation. *Green v. Ekins*, 2 Atk. 473; *Drakeley's Estate*, 19 B. 395; *Earl of Bective v. Hodgson*, 12 W. R. 625; 10 H. L. 656. A future residuary bequest carries the intermediate interest.

The case of *Green v. Tribe*, 27 W. R. 39, appears to be inconsistent with *Earl of Bective v. Hodgson*, unless it can be supported on the ground that the income of residuary personalty bequeathed to a class is undisposed of until a member of the class comes into being.

Chattels real comprised in a residuary gift follow the same rule as personalty proper. *Hodgson v. Earl of Bective*, 1 H. & M. 376; 10 H. L. 656.

8. If realty and personalty are blended in a future residuary gift, though the realty may not be directed to be sold, so as to create a mixed fund, intermediate profits will pass. *Genery v. Fitzgerald*, Jac. 468; *Glanvill v. Glanvill*, 2 Mer. 38; *Ackers v. Phipps*, 9 Bl. N. S. 431; 3 Cl. & F. 665. So will a future residuary gift of a mixed fund.

This rule applies though the realty and personalty are given in separate clauses, if both are intended to go in the same way. *In re Dumble*; *Williams v. Murrell*, 23 Ch. D. 360.

**Chap. XVII.** 9. Personality to be laid out in land, or realty to be converted, follow the rules of personality and realty respectively. *Bective v. Hodgson*, 10 H. L. 656.

When there is a gift to a class the income goes to those who take vested interests from time to time.

When there is a gift to a class, which is capable of increase up to the time of distribution, the whole of the income for the time being goes to those members who take vested interests from time to time. *Shepherd v. Ingram*, Amb. 448; *Mills v. Norris*, 5 Ves. 335; *Scott v. Earl of Scarborough*, 1 B. 154; *Mainwaring v. Beevor*, 8 Ha. 44; *Furneaux v. Rucker*, W. N. 1879, 135.

#### VII. INTEREST ON GENERAL LEGACIES.

Conveyancing Act, 1881.

Section 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that "where any property is held by trustees in trust for an infant either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not."

Under Lord Cranworth's Act (23 & 24 Vict. c. 145), sect. 26, trustees could only apply for maintenance of an infant "the income to which such infant may be entitled in respect of such property."

The construction put upon this section was that the income of a contingent legacy in cases where the income went with the capital could be applied for maintenance, but if the legacy did not carry interest until the time of vesting, then there was nothing upon which the power of maintenance could attach. *In re Cotton*, 1 Ch. D. 232; *In re George*, 5 Ch. D. 837.

Effect of 44 & 45 Vict. c. 41, s. 43.

It has been supposed that sect. 43 of the Conveyancing Act which authorises trustees, where property is held in trust for an infant absolutely or contingently, to apply for maintenance, "the income of that property," and not merely the income to

which the infant is or may be entitled, and to accumulate the income not applied, has the effect of making a simple legacy to an infant at a future time carry interest. Chap. XVII.

This view has, however, not been adopted, and it has been decided that the income of a legacy cannot be applied in maintenance, unless the legacy carries interest. *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Dickson*; *Hill v. Grant*, 28 Ch. D. 291; *affd.* 29 Ch. D. 331.

The rules with regard to interest on legacies are as follows :

Where a legacy is contingent or payable at a future time, and interest is given in the meantime or the income is given for maintenance, the whole interest or income as it accrues vests absolutely in the legatee. *Harris v. Finch*, M'Clel. 141; *In re Peek's Trust*, 16 Eq. 221. Interest given to a legatee vests absolutely as it accrues.

Where a legacy is charged upon land only, interest is payable from the testator's death. *Spurway v. Glyn*, 9 Ves. 483; *Shirt v. Westby*, 16 Ves. 393; *Pearson v. Pearson*, 1 Sch. & Lef. 10. Legacy charged on land only.

On the other hand, a legacy charged upon the proceeds of the sale of lands follows the ordinary rules applicable to general legacies with regard to interest. *Turner v. Buck*, 18 Eq. 301. Charged on proceeds of sale of lands.

General legacies, including gifts by appointment under a power vested in a married woman, are payable at the end of a year from the testator's death. *Tatham v. Drummond*, 2 H. & M. 262.

In the same way in the case of a gift of a sum of money to one for life with remainders over interest, begins to run from the end of a year from the testator's death. *Gibson v. Bott*, 7 Ves. 89; *In re Whittaker*; *Whittaker v. Whittaker*, 21 Ch. D. 657. Legacy for life with remainder.

The rate of interest allowed is 4 per cent., and it appears to be settled that that rate only will be allowed though the personalty is in a country where the current rate of interest is higher. *Order LV.*, rule 64; *Bourke v. Ricketts*, 10 Ves. 330; *Hamilton v. Dallas*, 38 L. T. 215. Rate of interest.

In the case of a power to direct portions to be raised out of land, if the power enables the donee to direct whether the portion is to be raised or not, he may also fix the rate of interest. Interest on portions.

But if the power merely enables the donee to distribute the

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Arrears of interest.

portions, only the ordinary rate of interest can be allowed namely 4 per cent. in the case of land in England, 5 per cent. in the case of land in Ireland. *Balfour v. Cooper*, 23 Ch. D. 472.

With regard to arrears of interest in cases where the Statute of Limitations does not apply, the court will, in cases of delay, follow the analogy of the statute and allow only six years' arrears to be recovered. *Thomson v. Eastwood*, 2 App. C. 215.

From what time interest is payable on general legacies when no time for payment is appointed.

A. Therefore, where no time for payment is fixed, interest runs from the end of a year from the testator's death, whether the legacies are payable "as soon as possible," or not. *Webster v. Hale*, 8 Ves. 410; *Benson v. Maude*, 6 Mad. 15.

A direction that no legacy shall be payable until six months after the testator's death, or that legacies shall be paid within four years, will not alter the general rule. *Jauncey v. A.-G.*, 10 W. R. 129; 3 Giff. 308; *In re Olive*; *Olive v. Westerman*, 32 W. R. 608.

Direction to pay out of fund when received.

Where there is a clear gift of a legacy, a direction to pay it out of a particular fund when received will not alter the rule that the legatee is entitled to interest from the end of a year after the testator's death. *Wood v. Penoyre*, 13 Ves. 326; see *Kirkpatrick v. Bedford*, 4 App. C. 96.

But if the trust to pay legacies only arises after the fund is got in, interest is not payable till then. *Lord v. Lord*, 2 Ch. 782.

A direction to apply a sum for building a church when it is wanted, without interest in the meantime, will not deprive the legacy of interest if payment is delayed by litigation. *Fisher v. Brierley*, 30 B. 268.

Effect of charge on a reversionary interest.

The rule as to interest is not altered by the fact that the legacies are charged upon personalty and a reversionary interest in realty, and if the personalty is insufficient, the legacies nevertheless bear interest from a year after the death. *Freeman v. Simpson*, 6 Sim. 75; *Earl of Milltown v. French*, 4 Cl. & F. 276; 10 Bl. N. S. 1; *In re Blachford*; *Blachford v. Worsley*, 27 Ch. D. 676.

But this is not the case where the fund out of which the legacy is primarily payable is wholly reversionary. *Earl v. Bellingham*, 24 B. 448.

On the other hand, interest is payable from the testator's death :— Chap. XVII.

1. Where the testator is the father or in *loco parentis* to the legatee, provided the latter is an infant. *Wilson v. Maddison*, 2 Y. & C. C. 372. Interest payable from the death.  
Testator in *loco parentis* to an infant.

If the infant is *in ventre* at the testator's death, interest runs only from his birth. *Rawlins v. Rawlins*, 2 Cox, 425.

2. Where the legatee, though a stranger, is an infant, and maintenance is given out of the legacy. *Newman v. Bateson*, 3 Sw. 689. Maintenance directed out of the legacy.

3. Where the legacy is in satisfaction of a debt of the testator. *Clarke v. Sewell*, 3 Atk. 99. Legacy in satisfaction of a debt.

A legacy to a wife does not, it seems, carry interest until a year from the death. *Stent v. Robinson*, 12 Ves. 461 ; *Lowndes v. Lowndes*, 15 Ves. 301 ; *In re Percy* ; *Percy v. Percy*, 24 Ch. D. 616.

A legacy in satisfaction of the debts of another person will not *prima facie* carry interest till the expiration of a year from the testator's death. *Askew v. Thompson*, 4 K. & J. 620.

But if certain property is to be applied among such persons as have "any just or indisputable demand" upon a third person, interest will be payable on the debts as far as the fund will go. *Aston v. Gregory*, 6 Ves. 151.

B. A legacy payable at a future day, whether vested or not, carries interest only from the time fixed for its payment. *Lloyd v. Williams*, 2 Atk. 108 ; *Heath v. Perry*, 3 Atk. 101 ; *Festing v. Allen*, 5 Ha. 575 ; *Gotch v. Foster*, 5 Eq. 311 ; *Lord v. Lord*, L. R. 2 Ch. 782 ; *Holmes v. Crispe*, 18 L. J. Ch. 439. When a time of payment is fixed interest runs from then.

If the period arrives in the testator's lifetime interest runs from his death. *Coventry v. Higgins*, 14 Sim. 30 ; *Pickwick v. Gibbs*, 1 B. 271.

The personal representatives of a legatee entitled to a vested legacy stand in no better position than the legatee ; therefore, where a time for payment is fixed and the legatee would not have been entitled to interest in the meantime, the legacy is not payable to the personal representatives till the time when it would have been payable to the legatee. *Chester v. Painter*, 2

**Chap. XVII.** P. Wms. 336 ; *Roden v. Smith*, Amb. 588 ; *Maher v. Maher*, 1 L. R. Ir. 22.

**Exceptions.** But though a period is appointed for payment, or the legacy is contingent, interest runs from the death :—

**Testator in loco parentis to an infant.** 1. Where the legatee is an infant child of the testator, or an infant to whom the testator has placed himself in *loco parentis*, and the will provides no other maintenance, whether the legacy be vested or contingent. *Harvey v. Harvey*, 2 P. W. 21 ; *Incedon v. Northcote*, 3 Atk. 432, 438 ; *Donovan v. Needham*, 9 B. 164 ; *May v. Potter*, 25 W. R. 507 ; see *Mole v. Mole*, 1 Dick. 310.

**Provision for maintenance.** If the testator has made a provision for the maintenance of his infant children, interest only runs from the time when the legacy is payable. *Hearle v. Greenbank*, 3 Atk. 697, 716 ; *Wynch v. Wynch*, 1 Cox. 433 ; see *In re George*, 5 Ch. D. 837.

Where there is provision for maintenance during a portion of the minority of the legatee, interest on the legacy will be allowed during the rest. *Chambers v. Goldwin*, 11 Ves. 1 ; *Martin v. Martin*, L. R. 1 Eq. 369 ; see *Cusack v. Jellicoe*, 22 W. R. 344.

2. If the infant legatee is a stranger, but the income is given for maintenance, interest runs from the death. *In re Richards*, 8 Eq. 119 ; *Chidgey v. Whitby*, 41 L. J. Ch. 699.

**General intention to provide maintenance.** 3. Upon similar grounds, where the legatees are strangers, if a general intention is expressed of providing for their maintenance out of their legacies, interest runs from the death. *Pett v. Fellows*, 1 Sw. 561, note ; *Lambert v. Parker*, Coop. t. Eldon, 143 ; *Leslie v. Leslie*, Ll. & G. t. Sug. 1.

The fact that maintenance is given in one particular event which does not happen is not enough. *Festing v. Allen*, 5 Ha. 575.

**Severed fund.** 4. Where a fund is directed to be at once set apart from the rest of the testator's estate, it carries the income from the testator's death. *Boddy v. Daves*, 1 Kee. 362 ; *Dundas v. Wolfe Murray*, 1 H. & M. 425 ; *Johnson v. O'Neill*, 3 L. R. Ir. 476.

A fund which has been severed for the benefit of a tenant for life and remainderman carries the interest accruing between the

death of the tenant for life and the vesting in the remainder- **Chap. XVII.**  
**man.** *Kidman v. Kidman*, 40 L. J. Ch. 359.

So, too, an appointed fund carries the intermediate interest.  
*Long v. Ovenden*, 16 Ch. D. 691.

To entitle the legatees of a severed fund to interest before vesting the severance must be necessary from causes connected with the legacy itself, and not, for instance, because the residue has become immediately payable. *Festing v. Allen*, 5 Ha. 578; *In re Judkin's Trusts*, 25 Ch. D. 743.

Where there is a future gift of principal "with interest," interest is calculated from the end of a year after the testator's death till the time of payment. *Knight v. Knight*, 2 S. & St. 490.

Future gift of principal with interest.

Where a vested legacy is given to an infant and no time of payment is fixed and the legacy is given over upon a contingency, the infant or his representatives are entitled to the interest which has accrued due till the contingency happens. *Taylor v. Johnson*, 2 P. W. 504; *Barber v. Barber*, 3 M. & Cr. 688; *Mills v. Roberts*, 1 R. & M. 555.

Vested legacy divested.

The provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26, enabling trustees to apply the income of infants' property towards their maintenance and directing the residue to be accumulated for the benefit of the persons ultimately entitled to the property, do not alter the law so as to deprive the representatives of the infant of accumulations made before the gift over takes effect. *In re Buckley's Trusts*, 22 Ch. D. 583.

The person taking a vested interest under the gift over, no condition as to payment being annexed to his gift, is entitled to interest from the time when the gift over takes effect, or from a year after the testator's death, whichever period is latest. *Laundy v. Williams*, 2 P. W. 481.

### VIII. PAYMENT OF ANNUITIES.

An annuity begins to run from the death of the testator; the first payment is therefore due at the end of a year unless the annuity is directed to be paid monthly or quarterly, in which case instalments are payable at the end of the first month or quarter. *Houghton v. Franklin*, 1 S. & St. 390.

From what time annuities are payable.

**Chap. XVII.** If payment on stated quarterly days is directed a proportional part is payable on the first quarterly day. *Williams v. Wilson*, 5 N. R. 266.

If the first payment of an annuity payable quarterly is directed to be made at the end of eighteen months, a quarter's instalment is payable at that time. *Irvin v. Ironmonger*, 2 R. & M. 531.

As to the postponement of an annuity till debts and legacies are paid, see *Asley v. Earl of Essex*, 6 Ch. 898; *Rawson v. M'Causland*, 1 R. 7 Eq. 284; 22 W. R. 145.

Sum to produce annuity.

Where a sum of money is directed to be invested to produce an annuity, it appears to be doubtful whether the gift is to be considered as a legacy payable at the end of a year or as an annuity payable from the death. *Gibson v. Bott*, 7 Ves. 89.

Arrears of an annuity do not carry interest.

Arrears of an annuity will not as a rule carry interest. *Batten v. Earnley*, 2 P. Wms. 163; *Anderson v. Dwyer*, 1 Sch. & Lef. 301; *Martin v. Blake*, 3 Dr. & War. 125; *Taylor v. Taylor*, 8 Ha. 120; *Torre v. Browne*, 5 H. L. 555; *Whateley v. Davies*, 24 W. R. 818.

## IX. LEGACY DUTY AND INCOME TAX.

Legacy duty—what amounts to a gift free from duty.

Legacy duty, in the absence of a direction to the contrary, is in all cases payable by the legatee even though the legacy is to a creditor in discharge of a debt due from a third person. *Foster v. Ley*, 2 Sc. 438; 2 B. N. C. 269.

Direction to pay legacy duty.

A direction to pay legacy duty does not include succession duty payable in respect of leaseholds. *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

A general direction in the will to pay all legacies free of deduction for tax or duty will include legacies given by the codicil. *Byne v. Currey*, 2 Cr. & Mee. 603; 4 Tyr. 479. See *Kirkpatrick v. Bedford*, 4 App. C. 96.

Legacies hereby given.

But a direction in the will to pay the duty on legacies "herein given" will not include legacies given by a codicil. *Early v. Benbow*, 2 Coll. 354; *Gillooly v. Plunkett*, 9 L. R. Ir. 324. See *Bonner v. Bonner*, 13 Ves. 378; *Radburn v. Jervis*, 3 B. 450.

In some cases, however, such words as “foregoing legacies” or “herein mentioned” have upon the general intention been extended to legacies given by a codicil. *Williams v. Hughes*, 24 B. 474; *Jauncey v. A.-G.*, 3 Giff. 308. Chap. XVII.

A direction to pay legacies free of duty is not necessarily limited to pecuniary legacies, but may include a debt which is forgiven and stock legacies and specific legacies. *Morris v. Livie*, 11 L. J. Ch. 172; *Ansley v. Cotton*, 16 L. J. Ch. 55; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

A direction to pay the legacy duty on the legacies and bequests given by the testator has been held not to include the duty on the proceeds of sale of realty directed to be sold and held on certain trusts. *White v. Lake*, 6 Eq. 188.

Legacies given free from deduction or free from expense, or free from charge or liability, are free from duty. *Barksdale v. Gilliatt*, 1 Sw. 652; *Courtoy v. Vincent*, T. & R. 433; *Gosden v. Dotterill*, 1 M. & K. 56; *Louch v. Peters*, 1 M. & K. 489; *Warbrick v. Varley*, 30 B. 241; see *Stow v. Davenport*, 5 B. & Ad. 357; 2 Nev. & M. 835; and see *Turner v. Mullineux*, 1 J. & H. 334. Free from deductions.

A gift of a clear sum or annuity is a gift clear of legacy duty. *Gude v. Mumford*, 2 Y. & C. Ex. 448; *Haynes v. Haynes*, 3 D. M. & G. 590. Gift of a “clear” sum.

So is a gift of a fund to produce a clear annual sum, which sum is to be paid to the legatee. *Morris v. Burton*, 11 Sim. 161; *Cole’s Will*, 8 Eq. 271.

But a gift of a fund to produce a clear annual sum and to pay the dividends of the stock, and not the exact sum to the legatee, is not a gift free from legacy duty, the term clear being referred to the costs of investment. *Banks v. Braithwaite*, 32 L. J. Ch. 35; *Sanders v. Kiddell*, 7 Sim. 536; *Pridie v. Field*, 19 B. 497.

A direction to pay an annuity free from deduction or abatement will not release the legatee from paying income tax. *Abadam v. Abadam*, 12 W. R. 615; 33 B. 475; *Turner v. Mullineux*, 1 J. & H. 334; *Sadler v. Rickards*, 4 K. & J. 302; *Peareth v. Marriott*, 22 Ch. D. 182; *Gleadow v. Leetham*, 22 Ch. D. 269. Income tax.

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But the testator may by proper words direct the income tax upon an annuity to be paid out of his estate. *Festing v. Taylor*, 11 W. R. 70; 3 B. & S. 217, 235; *Lord Lovat v. Duchess of Leeds*, 10 W. R. 397; 2 Dr. & Sm. 262; *In re Bannerman's Estate*; *Bannerman v. Young*, 21 Ch. D. 105.

Under a covenant to pay 10,000*l.* to trustees "free from all deductions," the succession duty is payable out of the 10,000*l.* and not out of the testator's estate. *In re Higgins*; *Day v. Turnell*, 29 Ch. D. 697.

## CHAPTER XVIII.

## AS TO THE MEANING OF CERTAIN WORDS.

I. MONEY includes bank notes (*a*), money at the bank on a current account as well as on deposit (*b*), money in the hands of an agent of the testator (*c*), apparently arrears of a superannuation allowance from government and money payable by a friendly society for funeral expenses (*d*), and any money, of which at the time of the testator's death, he might have claimed immediate payment (*e*). *Chapman v. Hart*, 1 Ves. Sen. 271 (*a*); *Manning v. Purcell*, 7 D. M. & G. 55 (*b*); *Ogle v. Knipe*, 8 Eq. 434 (*c*); *Collins v. Collins*, 12 Eq. 455 (*d*); *Byrom v. Brandreth*, 16 Eq. 476 (*e*).

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Money—what it includes.

It will not pass an apportioned part of an annuity nor accruing interest (*a*), nor money deposited with a stakeholder to abide the event of a bet (*b*), nor money due on a current account from a salesmaster (*c*), nor a legacy not acknowledged to be at the testator's disposal (*d*), nor stock in the funds (*e*), nor a sum due to the testator (*f*). *Byrom v. Brandreth*, 16 Eq. 475 (*a*); *Manning v. Purcell*, 7 D. M. & G. 55 (*b*); *Smith v. Butler*, 3 J. & L. 565; *De Roebuck v. Lord Cloncurry*, 1 R. 5 Eq. 588 (*c*); *Byrom v. Brandreth*, 16 Eq. 475 (*d*); *Hotham v. Sutton*, 15 Ves. 319; *Gosden v. Dotterill*, 1 M. & K. 56; *Ommaney v. Butcher*, T. & R. 260; *Lowe v. Thomas*, Kay, 369; 5 D. M. & G. 315; *Collins v. Collins*, 12 Eq. 455 (*e*); *Dillon v. McDonnell*, 7 L. R. Ir. 335 (*f*).

What it does not include.

Money will, however, pass stock where there is at the date of the will and the death no money properly so called; or where stock is expressly referred to as money. *Chapman v. Reynolds*, 28 B. 221; *Newman v. Newman*, 26 B. 218.

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When the  
word money  
will pass the  
residue.

In some cases a larger sense has been given to the term money, and it has been held to pass the residuary personalty:

1. It is clear that a gift of "the whole of my money" will only pass money properly so called, though there may be very little of it, and it is given for life with remainders, at any rate where the gift is followed by specific or general bequests. *Lowe v. Thomas*, Kay, 369; 5 D. M. & G. 315; *Larner v. Larner*, 3 Dr. 704.

So, too, money must be construed strictly where it is used as one of several terms of description, showing that it was not alone meant to pass the personal estate. *Cowling v. Cowling*, 26 B. 449; see *In bonis Aston*, 30 W. R. 92.

2. But where the testator declared himself desirous of making a settlement of his affairs, and appointed executors to take and receive all moneys in his possession or due to him, the whole personal estate was held to pass. *Waite v. Combes*, 5 De G. & S. 676.

And in *Prichard v. Prichard*, 11 Eq. 232, the whole personal estate was held to pass under a gift of the "income of my principal money" to A. for life, and afterwards to be divided among her children, apparently on the ground that there was only a sum of 239*l.* money proper at the testator's death. See *Cooke v. Wagster*, 2 Sm. & G. 296.

And in *In re Cadogan*; *Cadogan v. Palagi*, 25 Ch. D. 154, the whole personal estate passed under a gift of "one half of the money of which I am possessed" to A., "and the remainder to" B. See, too, *In re Townley*; *Townley v. Townley*, 32 W. R. 549.

Gift of resi-  
due of money  
after payment  
of debts and  
legacies.

3. When there is a direction to pay debts, or legacies have been given, and the residue of money is then given, the whole personal estate will pass. The general personalty being liable to pay debts and legacies, the residue must be a residue *ejusdem generis*. *Lynn v. Kerridge*, West. Rep. tem. Hard. 172; *Legge v. Asgill*, T. & R. 265, n.; *Rogers v. Thomas*, 2 Kee. 8; *Dowson v. Gaskoin*, *ib.* 14; *Stocks v. Barré*, Jo. 54; *Barrett v. White*, 24 L. J. Ch. 724; 1 Jur. N. S. 652; *Grosvenor v. Durston*, 25 B. 99; *In bonis White*, 7 P. D. 65; *In re Hart*; *Hart v. Hernandez*, 52 L. T. 217. See, too, *Lungdale v.*

*Whitfield*, 4 K. & J. 426. *Gosden v. Dotterill*, 1 M. & K. 56, Chap. XVIII. must be considered overruled.

In such a case the fact that a specific legacy is afterwards given makes no difference. *Montagu v. Earl of Sandwich*, 33 B. 324; *In re Pringle*; *Walker v. Stuart*, 17 Ch. D. 819.

Similarly, where the testator gave his money and goods to his wife for life, and at her death bequeathed certain legacies and the remainder of his property, the money was held to include the personal estate, as the testator showed that he was disposing at his wife's death of the same property as he meant her to have for life. *Glendening v. Glendening*, 9 B. 324.

A gift of "the rest of my money however invested" has been held to pass the residuary personal estate. *In re Pringle*; *Walker v. Stuart*, 17 Ch. D. 819.

Of course, if there is an express gift of residue, money must be construed in its strict sense. *Willis v. Plaskett*, 4 B. 208.

And a gift by codicil of "all moneys that may be left after my decease" where there is a gift of residue in the will passes only money properly so called. *Williams v. Williams*, 8 Ch. D. 789.

Such words as "ready money" (a), or "money to my ac-  
count" (b), or "money in bonds or consols or anything else" (c),  
or money referred to as "cash" (d), would require a very strong  
context to pass more than would be included in the words if  
taken in the ordinary sense. *Re Powell*, Jo. 49; *Bevan v.*  
*Bevan*, 5 L. R. Ir. 57 (a); *Hastings v. Hane*, 6 Sim. 67 (b);  
*Stooke v. Stooke*, 35 B. 396 (c); *Nevinson v. Lady Lennard*,  
34 B. 487 (d); see *In re Sutton*; *Stone v. A.-G.*, 28 Ch. D. 464.

"Money of or to which the testator may be possessed or  
entitled" will include moneys due on security or otherwise.  
*Langdale v. Whitfield*, 4 K. & J. 426; see *Wilkes v. Collin*, 8 Eq.  
338.

"Money due and owing at the testator's decease" will pass  
a balance at the bank (a), stock (b), damages recovered by the  
executor and unliquidated at the time of the death (c), money  
receivable on a policy of insurance upon the testator's life (d),  
and money due to the testator from an executor where the  
estate has been got in before the testator's death (e). *Carr v.*

**Chap. XVIII.** *Carr*, 1 Mer. 541 (a); *Waite v. Combes*, 5 De G. & S. 676 (b); *Bide v. Harrison*, 17 Eq. 76 (c); *Petty v. Wilson*, 4 Ch. 574 (d); *Bainbridge v. Bainbridge*, 9 Sim. 16 (e). See *Byrom v. Brandreth*, 16 Eq. 475.

Such words will not pass a distributive share in a residuary personal estate not proved to have been got in at the time of the death; nor money due on a contract of service not completed till after the testator's death. *Martin v. Hobson*, 8 Ch. 401; *Stephenson v. Dowson*, 3 B. 342. See *Collins v. Doyle*, 1 Russ. 135.

**Ready money.** "Ready money" will pass money at call at a bank, or in the hands of an agent used as a banker. *Parker v. Marchant*, 1 Y. & C. Ch. 290; 1 Ph. 356; *Powell's Trust*, Jo. 49; *Vaisey v. Reynolds*, 5 Russ. 12; *Fryer v. Rankin*, 11 Sim. 55.

It will not pass notes of hand (a), nor debts due from an agent (b), or in the hands of a salesmaster (c), nor dividends not demanded (d), nor rent or interest due on a mortgage (e). *Powell's Trust*, Jo. 49 (a); *Parker v. Marchant*, 1 Y. C. C. 290 (b); *Smith v. Butler*, 1 J. & L. 692 (c); *May v. Grove*, 3 De G. & S. 462 (d); *Fryer v. Rankin*, 11 Sim. 55 (e).

**Cash.** Similarly "cash" will not include bonds, long annuities or promissory notes. *Beales v. Crisford*, 13 Sim. 592.

A gift of "all I hold in the bank" has been held to pass deposit receipts and cash. *Townsend v. Townsend*, 1 L. R. Ir. 180.

**Money in the funds.** As to the meaning of the words "money in the funds," see *Burnie v. Getting*, 2 Coll. 324; *Mangin v. Mangin*, 16 B. 300; *Ridge v. Newton*, 2 D. & War. 239; *Slingsby v. Grainger*, 7 H. L. 273; *Ellis v. Eden*, 23 B. 543; *Brown v. Brown*, 6 W. R. 613.

A bequest of funds "purchased" out of separate estate will not pass savings of separate estate at the bank. *Askew v. Rooth*, 17 Eq. 426.

Nor will a gift of "property bequeathed to me" pass property intended to be bequeathed to the testator, but in fact given to him by act *inter vivos*. *In re Armstrong*, 49 L. J. Ch. 53.

**Securities for money.** "Securities for money" will not pass a balance on current account at the bank (a), money on a deposit account (b),

I. O. U.'s (c), shares (d), bank stock (e), mere debts (f), a lien Chap. XVIII.  
for unpaid purchase money (g), or money lent on mortgage where the legal estate is in trustees, and the testator is entitled only to the residue after certain payments (h). *Vaisey v. Reynolds*, 5 Russ. 12 (a); *Hopkins v. Abbott*, 19 Eq. 222 (b); *Barry v. Harding*, 1 J. & Lat. 475 (c); *Huddleston v. Gouldbury*, 10 B. 547; *Turner v. Turner*, 21 L. J. Ch. 843 (d); *Ogle v. Knipe*, 8 Eq. 434 (e); *Re Mason's Will*, 34 B. 494 (f); *Goold v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116 (g); *Ogle v. Knipe*, *supra* (h).

But it passes money lent on mortgage, the right to receive which is in the testator, and stock in the funds. *Ogle v. Knipe*, *supra*; *Bescoby v. Pack*, 1 S. & St. 500.

In cases of death before the 1st of January, 1882 (see the Conveyancing Act, sec. 30), the term securities for money passes the legal estate in mortgaged property whether there are words of limitation or not. *King's Mortgage*, 5 De G. & S. 644; *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115; 10 Bing. 44; 3 M. & Sc. 687; *Rippen v. Priest*, 13 C. B. N. S. 308. Whether the legal estate in a mortgage passes.

This is the case though the subject matter of the gift is expressly made subject to payment of debts, a direction inapplicable to the legal estate. *Re Field*, 9 Ha. 414; *Knight v. Robinson*, 2 K. & J. 503; overruling *Silvester v. Jarman*, 10 Pr. 73.

It seems the fact that the gift is to several persons as tenants in common, would not prevent the legal estate from passing. *Ex parte Whiteacre*, cited 1 Sand. on Uses, 359 n.; 1 Jar. 699.

Mortgages on real security do not include mortgages of turnpike road tolls and of turnpike-road toll-houses. *Cavendish v. Cavendish*, 24 Ch. D. 685; *revd.* W. N. 1885, 42. Mortgages on real security.

It seems doubtful whether the term "money on security" will by itself pass the legal estate in mortgaged property; but it will if the donee is to receive the money on security, &c. *Re Cautley*, 17 Jur. 124; 22 L. J. Ch. 391; *Doe d. Guest v. Bennett*, 6 Ex. 892; *Arrowsmith's Trust*, 27 L. J. Ch. 704; 4 Jur. N. S. 1123; see *Brown v. Brown*, 6 W. R. 613. Money on security.

But the term will not pass a charge created under a settlement to which the testator is entitled. *Earl Poulett v. Hood*, 35 B. 234.

**Chap. XVIII.** Possibly the expression rights and credits might pass the personal estate. *Hutchinson v. Hutchinson*, 13 Ir. Eq. 332.

**Debts.** A gift to A. of the debts due from him to the testator means the debts remaining after deducting a debt due from the testator to A. *Ekins v. Morris*, 8 W. R. 301; *Ganly v. Dowling*, 5 L. R. Ir. 628.

**Book debts.** Book debts appear to mean the amount due to the testator after deducting trade debts and private debts due from him *Chick v. Blackmore*, 2 W. R. 488.

A gift to A. of a debt due from him means a debt due from him solely if there is such a debt, and not a debt due from the firm to which A. belongs. *Ex parte Kirk*; *In re Bennett*, 5 Ch. D. 800.

In the same way a bequest of a debt due to the testator from A. would naturally mean a debt due to the testator alone, and not the testator's share of a debt due from A. to the testator's firm, though it may have that meaning if there is no debt due to the testator solely. *Maybery v. Brooking*, 7 D. M. & G. 673.

A direction to pay the testator's debts, including a debt of a certain amount owing to A. where the amount of the debt is overstated, will not entitle A. to receive more than the amount strictly owing. *Wilson v. Morley*, 5 Ch. D. 776.

A bequest of a certain sum described as the amount in which the legatee is indebted to the testator would entitle the legatee to the sum given, though the debt may be paid before the death of the testator. *Vickers v. Pound*, 6 H. L. 885.

A direction that a debtor is to be released from all claims in respect of moneys "now owing" to the testator, and all other moneys due from him, will release the debtor from advances made subsequent to the date of the will. *Everett v. Everett*, 7 Ch. D. 428: see pp. 94, 156.

**Railway shares.**

Under the description railway shares, shares and stock will pass together. *Morrice v. Aylmer*, L. R. 10 Ch. 148; *ib.* 7 H. L. 717, overruling *Oakes v. Oakes*, 9 Ha. 666.

**Mining shares.**

Debentures will not pass. *Dillon v. Aikins*, 13 L. R. Ir. 557. As to the meaning of mining shares, see *Duchess of Cleveland v. Meyrick*, 37 L. J. Ch. 125.

Foreign bonds will not include colonial bonds. *Hull v. Hill*, Chap. XVIII.  
4 Ch. D. 97; and see *Cadett v. Earle*, 46 L. J. Ch. 798.

A gift of plate does not include plated articles. *Holden v. Ramsbottom*, 4 Giff. 205. Foreign  
bonds.  
Plate.

Furniture *primâ facie* includes only such furniture as is Furniture.  
reserved for domestic or personal use. *Farrant v. Spencer*,  
1 Ves. sen. 97; *Pratt v. Jackson*, 2 P. Wms. 302; 1 Bro. P. C.  
222; *Manning v. Purcell*, 2 Sm. & G. 284; 7 D. M. & G. 55;  
*Domville v. Taylor*, 32 B. 604.

It includes plate and pictures and probably ornaments; but  
not wine or books or tenant's fixtures. *Kelly v. Powlett*, Amb.  
605; *Porter v. Tournay*, 3 Ves. 311; *Field v. Peckett*, 9 W. R.  
526; *Finney v. Grice*, 10 Ch. D. 13; *In re Londesborough*;  
*Bridgman v. Fitzgerald*, 50 L. J. Ch. 9; see, too, *Cole v. Fitz-*  
*gerald*, 1 S. & St. 189; 3 Russ. 301; *Birch v. Dawson*, 2 A. & E. 37.

A gift of furniture in a house passes only the furniture per-  
manently kept there. *Wilkins v. Jodrell*, 11 W. R. 588.

A gift of household goods or household furniture where the Household  
testator has furniture at his private house, and also at his place goods.  
of business, does not pass the latter. *Pratt v. Jackson*, 2 P. W.  
302; 1 B. P. C. 222; *Le Farrant v. Spencer*, 1 Ves. sen. 97;  
*Manning v. Purcell*, 7 D. M. & G. 55.

"Objects of vertu or taste" would not, as a general rule, Objects of  
include valuable pictures. *In re Londesborough*; *Bridgman* virtu.  
*v. Fitzgerald*, 50 L. J. Ch. 9.

A bequest of chattels in a house will not pass choses in action, Chattels in  
such as bonds or securities for money in the house, which are a house.  
considered not property in the house, but evidence of title to  
property elsewhere. *Green v. Symonds*, 1 B. C. C. 139; *Lady*  
*Aylesbury's Case*, 11 Ves. 662; *Chapman v. Hart*, 1 Ves. sen.  
271; *Moore v. Moore*, 1 B. C. C. 127; *Fleming v. Brook*, 1 Sch.  
& L. 318; *Brooke v. Turner*, 7 Sim. 671; *Hertford v. Lowther*,  
7 B. 1; see *Turner v. Turner*, 28 W. R. 859; 14 Ch. D. 829.

Bank notes will pass under such a bequest. *Popham v. Lady*  
*Aylesbury*, Amb. 68; *Brooke v. Turner*, *supra*.

A gift of articles in or about the testator's mill has been held  
not to pass a cargo of wheat in course of transit at the testator's  
death. *Lane v. Sewell*, 43 L. J. Ch. 378.

**Chap. XVIII.** A gift of property in a county, or in a foreign country, has been held to pass debts due from persons living there. *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613; *Guthrie v. Walrond*, 22 Ch. D. 573.

**Emblements.** The devisee of land is entitled to the emblements, unless they are expressly given away, and a general residuary bequest is not sufficient for this purpose. *Cooper v. Woolfit*, 5 W. R. 790; 2 H. & N. 122; see *Blake v. Gibbs*, 5 Russ. 13 n.

**Farming stock.** Under the term stock, growing crops will pass to the devisee of the land where they grow. *Blake v. Gibbs*, 5 Russ. 13 n.

If the farm is devised to A. and the stock to B., growing crops will pass to B. whether the gift of the stock is coupled with the general personal estate or not. *Cox v. Godsalve*, 6 East, 604 n.; *West v. Moore*, 8 East, 339; *Rudge v. Winnal*, 12 B. 357; *In re Roose*; *Evans v. Williamson*. 17 Ch. D. 696, overruling *Vaisey v. Reynolds*, 5 Russ. 12; and see *Harvey v. Harvey*, 32 B. 441; *Creagh v. Creagh*, 13 Ir. Ch. 28; *Burbidge v. Burbidge*, 16 W. R. 76.

**Live and dead stock.** As to live and dead stock, see *Hutchinson v. Smith*, 11 W. R. 417.

**Plant and goodwill.** A gift of plant and goodwill does not pass stock, but it may pass a leasehold house where the business is carried on. *Blake v. Shaw*, Jo. 732.

**Business.** A direction to transfer a business to a son at twenty-one, has been held not to include a freehold shop where the business was conducted. *In re Henton*; *Henton v. Henton*, 30 W. R. 702; see *Devitt v. Kearney*, 13 L. R. Ir. 45.

A gift of a goodwill and business does not pass the capital or stock used in the business. *Delany v. Delany*, 15 L. R. Ir. 55.

**Stock in trade.** A bequest by a barge builder of his business and stock in trade, will pass old barges taken in part payment for new barges, and subsequently let out on hire. *Richardson v. Pilliner*, 50 L. J. Ch. 488.

Upon the question whether a bequest of the stock in trade of a carriage builder will pass an unfinished carriage, see *Elliott v. Elliott*, 9 M. & W. 23.

For the meaning of the word patrimony, see *Green v. Giles*, 5 Ir. Ch. 25.

The word legacy is primarily applicable to personalty only. Chap. XVIII.

It does not apply to land given on trust for sale and division, Legacy.  
but it does to a legacy charged on real estate. *White v. Lake*,  
6 Eq. 188; *Hodges v. Grant*, 4 Eq. 140.

But it may refer to realty if there is nothing else to which it  
can refer. *Hope d. Brown v. Taylor*, 1 Burr. 268; *Hardacre*  
*v. Nash*, 5 T. R. 716.

Similarly, the appointment of a residuary legatee will only Legatee.  
give him personal property. *Windus v. Windus*, 21 B. 373;  
6 D. M. & G. 549; *Hillas v. Hillas*, 10 Ir. Eq. 134; *Re Giles*,  
14 Ir. Ch. 311; *Kellett v. Kellett*, 3 Dow. 248; *Cooney v. Nicholls*,  
7 L. R. Ir. 107.

But the appointment of a person "residuary legatee of all When the  
residuary  
legatee takes  
realty.  
*my property*" will give him realty. *Warren v. Newton*,  
*Drury*, 464; *Day v. Dameron*, 12 Sim. 200; *Davenport v.*  
*Coltman*, 9 M. & W. 481; 12 Sim. 588.

So, too, if the testator expresses an intention of disposing of  
all his real and personal estate, and then appoints a residuary  
legatee. *Pitman v. Stevens*, 15 East, 505.

Probably if the testator, after making certain devises, appoints  
a residuary legatee, real estate would pass to him. At any rate,  
this is the case if the testator prefaces his will with the  
expression of an intention to dispose of his estate, which must  
mean his whole estate. *Hughes v. Pritchard*, 6 Ch. D. 24;  
*Re Salter*; *Farrant v. Carter*, 44 L. T. 603; see *In re Methuen*  
*and Blore's Contract*, 16 Ch. D. 696, where there was no  
previous devise of realty.

The testator may show that he includes realty in the residuary  
gift by a direction not to sell a house till the death of the tenant  
for life, on whose death the property becomes divisible among  
the residuary legatees. *Davenport v. Coltman*, 9 M. & W.  
481.

When realty and personalty are made a mixed fund for the  
payment of legacies, it seems the residuary legatee will take  
everything that remains. *Evans v. Crosbie*, 15 Sim. 602;  
*Wildes v. Davies*, 1 Sm. & G. 475; see *post*, pp. 186—188.

So where there is an absolute direction to sell the testator's  
real estate and he disposes of the proceeds of his property, the

**Chap. XVIII.** appointment of a residuary legatee gives him the residue of the proceeds of sale of the realty. *Singleton v. Tomlinson*, 3 App. C. 404.

**Annuities are legacies.** The word legacies includes annuities. *Bromley v. Wright*, 7 Ha. 334; *Ward v. Grey*, 26 B. 485; *Mullins v. Smith*, 1 Dr. & S. 204; *Heath v. Weston*, 3 D. M. & G. 601; *Sibley v. Perry*, 7 Ves. 522.

And the term pecuniary legacies would also, it would seem, include annuities. *Gaskin v. Rogers*, L. R. 2 Eq. 284.

But if the testator expressly distinguishes between legatees and annuitants, legacies will not include annuities. *Gaskin v. Rogers*, *supra*; *Weldon v. Bradshaw*, L. R. 7 Eq. 168.

It seems the term legacy does not *prima facie* include a gift of residue, though legatee would include a residuary legatee. *Ward v. Grey*, 26 B. 485.

**Manor.** The term manor comprises the demesne lands, including the waste of the manor and the freehold inheritance of the customary lands held of the manor, the services of freehold tenants of the manor, and the right to hold a Court Baron and a customary Court.

There may also be included in the manor certain franchises, such as a Court leet, treasure trove, wreck of the sea, and the like. See Elton on Copyholds, p. 13.

The term of course includes allotments made to the lord under an Inclosure Act in respect of his right in the soil. Such lands are already parcel of the manor, and the effect of the inclosure is only to free them from customary and prescriptive rights. *Hicks v. Sallitt*, 2 W. R. 173; 3 D. M. & G. 782; see, too, *Williams v. Phillips*, 8 Q. B. D. 437.

Further, the word manor includes copyhold tenements of the manor purchased by the lord, though the lord's equitable title may not be perfect. *Hicks v. Sallitt*, *supra*.

Freehold lands held of the manor may again become parcel of the manor by escheat. *Delacherois v. Delacherois*, 13 W. R. 24; 11 H. L. 62.

**Manor does not include purchased freeholds.**

But freehold lands held of the manor and purchased by the lord do not thereby become parcel of the manor, so as to pass by the description manor, though no doubt they might become

parcel of the manor by reputation. *Delacherois v. Delacherois*, Chap. XVIII. *supra*; *R. v. Duchess of Buccleuch*, 6 Mod. 151.

A devise under a power of the surface to A. and the mines <sup>Rents from mines.</sup> to B. carries to A. accumulations of rents down to the testator's death derived from the mines under a lease under the Settled Estates Act, the money being subject to investment in land under the Act. *In re Scarth*, 10 Ch. D. 499.

If an advowson is directed to be sold, and the proceeds in- <sup>Advowsons.</sup> vested for the benefit of a tenant for life, the tenant for life is entitled to present upon a vacancy occurring before sale. *Briggs v. Sharp*, 20 Eq. 317.

If the proceeds of sale are divisible among tenants in common, the right of presentation before the advowson is sold will be determined by lot. *Johnstone v. Baber*, 4 W. R. 827; 6 D. M. & G. 439.

A devise of hereditaments situate in A. will not pass an advowson, if there is property to which the devise may apply. *Crompton v. Jarrutt*, 33 W. R. 913.

The word living may mean the advowson or the next presen- <sup>Living.</sup> tation. If the devise is coupled with words which contemplate personal enjoyment by the devisee, and there are no words of inheritance, the next presentation alone passes. *Webb v. Byng*, 4 W. R. 657; 2 K. & J. 669.

Under a devise of lands and advowsons to trustees upon trusts to apply the profits during a given period to certain purposes, the proceeds of sale of a next presentation during that period are not undisposed of so as to pass to the heir at law. *Earl of Albemarle v. Rogers*, 7 B. P. C. 522; *Cust v. Middleton*, 13 W. R. 249.

A devise of freehold or leasehold ground rents passes the <sup>Ground rents.</sup> reversion. *Maundy v. Maundy*, 2 Stra. 1020; *Kaye v. Laxon*, 1 B. C. C. 76.

The term messuage or house will pass the orchard, garden <sup>Messuage.</sup> and curtilage. Co. Lit. 5 b.; *Carden v. Tuck*, Cro. El. 89; 3 Leon. 214, pl. 283; see *Lombe v. Stoughton*, 18 L. J. Ch. 100; see *Heach v. Prichard*, W. N. 1882, 140.

It will also pass a piece of land or a cellar severed from the house, but near it and necessary for the convenient use of it. See *Hibon v. Hibon*, 11 W. R. 455; 32 L. J. Ch. 374; *Doe v.*

Chap. XVIII. *Collins*, 2 T. R. 498; *Steele v. Midland Ry. Co.*, 1 Ch. 275, p. 289.

If the testator in one part of his will gives a house and lands, and in another part uses the word house only, probably the latter devise would not carry land occupied with the house. *Buck d. Whalley v. Nurton*, 1 B. & P. 53; see 1 Bing. 498; *Roe d. Walker v. Walker*, 3 B. & P. 375.

"The leasehold premises, 32, Prince's Gate," has been held to pass stables held with the house under a separate lease. 49 L. T. 629.

**Appurtenances.**

A devise of a house with its appurtenances probably has no wider meaning than a devise of a house alone. Such a devise will pass everything naturally belonging to the enjoyment of the house, such as a garden and orchard and a small piece of land occupied with the house. *Boocher v. Samford*, Cro. El. 113; *Doe d. Lemprière v. Martin*, 2 W. Bl. 1148; *Buck d. Whalley v. Nurton*, 1 B. & P. 53; see *Willis v. Watney*, 51 L. J. Ch. 181 (yards).

But land will not pass as appurtenant to a house or to other lands. See *Plowd.* 169 a, 170; *Co. Lit.* 121 b.; *Hearn v. Allen*, Cro. Car. 57; *Lister v. Pickford*, 34 B. 576; see *Cuthbert v. Robinson*, 30 W. R. 366.

If the devise is of certain property with the lands appertaining or belonging thereto, this is not to be taken in the strict sense of appurtenant, but in the sense of usually occupied therewith. *Hill v. Grange*, 1 Plow. 170; *Dyer*, 130 b.; *Ongley v. Chambers*, 1 Bing. 483; *Doe d. Gore v. Langton*, 2 B. & Ald. 680.

**Use and occupation.**

A gift of the use and occupation of a house does not involve a personal use so as to prevent the donee from letting. *Rabbeth v. Squire*, 4 De G. & J. 406; *Mannox v. Greener*, 14 Eq. 456.

But a gift over, if the donee ceases to occupy the house, shows that the testator contemplated a personal use. *Maclaren v. Stainton*, 27 L. J. Ch. 442; 4 Jur. N. S. 199.

A provision that the testator's widow may reside rent free in his residence does not enable her to let the house, but she may reside there from time to time without forfeiting her right. *May v. May*, 44 L. T. 412.

A gift of the use of plate following a gift of other articles to the same legatee in absolute terms has been held a gift for life only. *Espinasse v. Luffingham*, 3 J. & L. 186. Chap. XVIII.  
Use of plate.

For the meaning of a gift of the use of book debts and capital, see *Terry v. Terry*, 12 W. R. 66.

A devise of a house as occupied by A. will not pass a merely occasional easement enjoyed by A. over other property of the testator, though the words "as enjoyed by A." might. *Polden v. Bastard*, L. R. 1 Q. B. 156; *Bodenham v. Pritchard*, 1 B. & C. 350. Devise of a  
house as  
occupied  
by A.

Where a testator devises a piece of land to A., and another piece of land to B., and the only access to the latter is over the former, B. is entitled to a right of way over A.'s land. Right of way.

If the testator has himself used a certain way for purposes of access to B.'s land, that will be the way to which A. is entitled. *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761.

If no way can be said to have been used by the testator for the purpose of access to the land-locked land, it would seem that the owner of the servient tenement would be entitled to set out the way, subject to the restriction that taking all the circumstances into consideration it must be a reasonable way. See *Bolton v. Bolton*, 11 Ch. D. 968; and as to the user of the way, see *Corporation of London v. Riggs*, 13 Ch. D. 798.

The proper legal meaning of "the premises" is *præmissa*, but it may be used in a popular sense as a description of certain property, as in the phrase house and premises; in such a case it will only include property in connection with the particular property mentioned. *Sanford v. Irby*, 4 L. J. Ch. 23; *Lethbridge v. Lethbridge*, 3 D. F. & J. 523; 4 *ib.* 35; *Read v. Read*, 15 W. R. 165. Premises.

The word "moiety" may be used as equivalent to share. *Morrow v. McConville*, 11 L. R. Ir. 236. Moiety.

## II. WORDS APPROPRIATE TO REALTY AND PERSONALTY RESPECTIVELY.

Under the words *personal* property, estate; and effects, personal property alone passes. *Belaney v. Belaney*, L. R. 2 Eq. 210; 2 Ch. 138; *Jones v. Robinson*, 3 C. P. D. 344.

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And possibly the word property would not pass realty if it is coupled with explanatory words relating only to personalty, such as "both in stock, household furniture, cash, &c., &c." *Mullally v. Welsh*, I. R. 6 C. L. 314; see 3 L. R. Ir. 244.

Words estate  
or property  
alone will  
pass realty,

1. The words estate or property alone are, however, sufficient to carry real estate, *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. 76; 11 Jur. 193; *Hawksworth v. Hawksworth*, 27 B. 1; *In re Smart's Estate*; *Fox v. Shipman*, W. N. 1882, 77; *In re Heginbotham*; *Wilson v. Heginbotham*, W. N. 1884, 179.

where  
coupled with  
other words.

Where these words are coupled with other words which would alone be sufficient to carry the whole of the personal property, the word estate will, *prima facie*, carry realty, as it would otherwise be insensible. *Tilley v. Simpson*, 2 T. R. 659 n.; *Edwards v. Barnes*, 2 Bing. N. C. 252; *Doe d. Walls v. Langlands*, 14 East. 370; *Jongsma v. Jongsma*, 1 Cox, 362; *Patterson v. Huddart*, 17 B. 210; *Hamilton v. Buckmaster*, L. R. 3 Eq. 232; *Sunderson v. Dobson*, 7 C. B. 81, and 10 B. 47, overruling same case, 1 Ex. 141; and see *Dobson v. Bowness*, 5 Eq. 404; *Loftus v. Stoney*, 17 Ir. Ch. 178.

If there are any words in the gift accurately applicable to realty, such as "devise," the fact that the trusts declared are only applicable to personalty will not prevent the real estate from passing. *Doe d. Burkitt v. Chapman*, 1 H. Bl. 223; *Dunnage v. White*, 1 J. & W. 583; *Stokes v. Salomons*, 9 Ha. 75; *Lloyd v. Lloyd*, 7 Eq. 458; *Longley v. Longley*, 13 Eq. 133.

Real estate will pass even if there are no words technically appropriate, and the trusts declared are not literally applicable to realty, if they can be held popularly applicable. *Saumarez v. Saumarez*, 4 M. & Cr. 331; *D'Almaine v. Moseley*, 1 Drew. 632; *Morrison v. Hoppe*, 4 De G. & Sm. 234.

Thus the words "collect and get in" will not prevent realty from passing. *Hamilton v. Buckmaster*, L. R. 3 Eq. 323.

Trust for  
sale.

So, too, if the trust is for sale or investment, the inapplicability of the subsequent trusts to realty is immaterial. *O'Toole v. Browne*, 3 E. & B. 572; *Streatfield v. Cooper*, 27 B. 338; *Fullerton v. Martin*, 22 L. J. Ch. 893; *Dobson v. Bowness*, 5 Eq. 404. See, too, *Affleck v. James*, 17 Sim. 121.

If, however, the gift is to trustees, their executors, adminis- Chap. XVIII.  
trators and assigns, on trusts exclusively applicable to personalty,  
real estate will not pass. *Doe d. Spearing v. Buckner*, 6 T. R.  
610; *Pogson v. Thomas*, 6 Bing. N. C. 837; *Coard v. Holderness*,  
20 B. 147.

It has sometimes been said, that if the words with which the  
word "estate" is coupled are not sufficient to carry all the  
personal property, estate will be confined to personalty. See Estate  
coupled with  
words insuf-  
ficient to pass  
personalty.  
*Tilley v. Simpson*, 2 T. R. 659 n.; *D'Almaine v. Moseley*, 1 Dr.  
632. The rule appears, however, to be unsupported by actual  
decision, and has been disapproved of. See *Loftus v. Stoney*,  
17 Ir. Ch. 178; *Re The Greenwich Hospital Improvement Act*,  
20 B. 458.

At any rate, where there is a prior devise of lands a gift of  
the "rest and residue of my estate," or "all other my estate,"  
though coupled with words which would not alone carry all  
the personalty, will carry realty. *Scott v. Alberry*, Com. 337;  
8 Vin. Abr. 229, pl. 14; *Fletcher v. Smiton*, 2 T. R. 656.

Of course where the testator shows that he uses the word  
estate as equivalent to effects, only personalty will pass. *Time-  
well v. Perkins*, 2 Atk. 102; *Doe d. Hurrell v. Hurrell*, 5 B. &  
Ald. 18.

2. A devise of "real estate of which I may die seised" will  
not pass lands which at the testator's death are in the wrongful  
possession of strangers. *Leach v. Jay*, 6 Ch. D. 496; 9 Ch.  
D. 42.

3. The words "whatever I may die possessed of" alone would  
probably carry realty. What I may  
die possessed  
of.

At any rate this is clearly the case where they are coupled  
with words sufficient to carry the whole personalty. *Evans v.  
Jones*, 46 L. J. Ex. 280.

It makes no difference that the person to whom the gift is  
made is also appointed executor. *Pitman v. Stevens*, 15 East.  
505; *Wilce v. Wilce*, 5 M. & P. 682; 7 Bing. 664; *Thomas v.  
Phelps*, 4 Russ. 348.

*Monk v. Maudsley*, 1 Sim. 286, and *Cook v. Jaggard*, L. R.  
1 Ex. 125, were both cases before the Wills Act in which the  
question was whether the words, "whatever I die possessed of,"

**Chap. XVIII.** would pass the fee to a devisee to whom specific devises for life and in tail had already been made.

**All the rest.** 4. The words "all the rest," though following gifts of personalty, will pass realty. *Atree v. Atree*, 11 Eq. 280; *Smyth v. Smyth*, 8 Ch. D. 561.

**Effects.** 5. The word effects *prima facie* will not pass real estate. *Doe v. Dring*, 2 Mau. & S. 448; *Doe d. Haw v. Earles*, 15 M. & W. 450; see, however, *Smyth v. Smyth*, *supra*; *A.-G. of British Honduras v. Bristowe*, 50 L. J. P. C. 15.

But the testator may show that he intended realty to pass by the word effects, by referring, for instance, to property including realty as "such effects." *Marquis of Titchfield v. Horncastle*, 2 Jur. 610; *Milsome v. Long*, 3 Jur. N. S. 1073.

The words effects both real and personal will pass realty. *Hogan v. Jackson*, 3 B. P. C. 388; Cowp. 299.

**Chattels.** 6. On the other hand, chattels real and personal, *prima facie*, will not, unless explained by the context. *Grayson v. Atkinson*, 1 Wils. 333.

7. The expression wordly goods of what nature and kind soever passes realty. *Wright v. Shelton*, 18 Jur. 445.

8. The appointment of a person executor of the testator's property has been held sufficient to give him the fee in real estate. *Doe d. Hickman v. Haslewood*, 6 A. & E. 167; *Doe d. Pratt v. Pratt*, *ib.* 180; *Murphy v. Donelly*, I. R. 4 Eq. 111.

**Locality of personalty.** 9. For the construction of bequests of personalty described with reference to a particular locality, see *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613; *Ashton v. Horsfield*, 2 Jur. N. S. 193; 6 *ib.* 355; *In bonis Ewing*, 6 P. D. 19.

## CHAPTER XIX.

### THE EFFECT OF A DEVISE IN GENERAL TERMS.

#### I. FREEHOLDS.

IN wills, prior to the Wills Act, a residuary devise included only lands possessed by the testator at the date of his will, and of which he had not attempted to make any disposition by his will. Chap. XIX.  
Operation of  
a general  
devise on  
freeholds  
before the  
Wills Act.

It included, therefore, the reversion in lands in which partial interests only had been previously given. *Rooke v. Rooke*, 2 Vern. 461; 1 Eq. Ab. 210, pl. 17; *White v. Vitty*, 2 Russ. 484; 4 Russ. 584.

And in the case of contingent and executory devises it included the interest undisposed of in the event of those devises not taking effect, or until they took effect, but not lapsed or void devises. *Doe d. Wells v. Scott*, 3 Mau. & S. 300; *Egerton v. Massey*, 3 C. B. N. S. 338.

Now by the 25th section of the Wills Act, real estate comprised in any devise which shall fail or be void shall be included in a residuary devise.

Under this section where an appointment under a general or special power fails or is void, it has been held that the property falls into residue unless there is a contrary intention expressed. *Freme v. Clement*, 18 Ch. D. 499; this case was, however, not approved in *Holyland v. Lewin*, 26 Ch. D. 266.

By the 24th section every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Wills Act  
makes the  
will speak  
from the  
death.

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The section probably does not apply to property excepted out of a devise. Thus, where a testator excepts from a devise property subject to the trusts of a settlement, and afterwards conveys other property upon the trusts of the settlement, the latter property is not excepted from the devise. *Hughes v. Jones*, 11 W. R. 898; 1 H. & M. 765.

What is a  
contrary  
intention.

A contrary intention is not sufficiently manifested by a gift of the freeholds, "to which I *am* entitled," though there may be a subsequent devise of copyholds "to which I *am* or at the time of my death shall be entitled." *Ld. Lilford v. Powys Keck*, 30 B. 300.

Use of the  
word "now."

The fact that the testator gives property he "now" possesses, or that the property is described as "now" charged with certain sums, will not exclude after acquired property. *Wagstaff v. Wagstaff*, 8 Eq. 229; *Hepburn v. Skirving*, 4 Jur. N. S. 651; *In re Ord*; *Dickinson v. Dickinson*, 12 Ch. D. 22; *In re Portal and Lamb*, 27 Ch. D. 600.

But if the testator expressly distinguishes between the two periods by giving such freeholds and leaseholds as are now vested in me, "or as to the said leasehold premises as shall be vested in me at the time of my death," the word now must be referred to the date of the will. *Cole v. Scott*, 1 Mac. & G. 518; 1 H. & T. 477. See pp. 94 and 144.

## II. REVERSIONS.

Reversions  
pass under  
a general  
devise.

1. Reversions, whether vested in the testator at the time of making his will or remaining in him after the limitations of his will are exhausted, pass by a general devise of lands. *Chester v. Chester*, 3 P. W. 56; *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Mostyn v. Champneys*, 1 Scott, 293; 1 Bing. N. C. 341.

Devise of  
lands not  
settled in-  
cludes a  
reversion  
in settled  
lands,

2. A devise of lands not settled, or out of settlement, is equivalent to a devise of lands not otherwise disposed of, over which the testator has absolute dominion, and will therefore pass a reversion in fee in settled lands, though the testator may confirm the settlement. *Incorporated Society v. Richards*, 1 Dr. & War. 258; *Chester v. Chester*, 3 P. W. 56; *A.-G. v.*

*Vigors*, 8 Ves. 256; *Jones v. Skinner*, 5 L. J. Ch. 87; *Kelly v. Duffy*, 4 L. R. Ir. 601. Chap. XIX

A charge of annuities upon the lands passing by the general words will not exclude reversions. *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Doe d. Pell v. Jeyes*, 1 B. & Ad. 593.

3. The fact that the limitations on which the reversion is dependent are such that some of the limitations of the will cannot take effect upon the reversion, will not prevent the reversion from passing. though some of the limitations are inappropriate to the reversion.

If there are other lands besides the reversion the limitations inapplicable to the reversion will be referred to the other lands *reddendo singula singulis*. *Doe d. Earl Cholmondeley v. Weatherby*, 11 East, 322; *William d. Hughes v. Thomas*, 12 East, 141; *Freeman v. Duke of Chandos*, Cowp. 363; *Doe d. Nethercote v. Bartle*, 5 B. & Ald. 492; *Morris v. Lloyd*, 33 L. J. Ex. 202.

And under this head would come all wills since the Wills Act, where such of the limitations as can never take effect upon the reversion may be looked upon as intended to operate upon after-acquired lands.

And even if there are no other lands the reversion will pass if some of the limitations of the will are applicable to it. *Church v. Mundy*, 12 Ves. 426; *Tennent v. Tennent*, Dru. temp. Sugden, 161; 1 Jo. & Lat. 379; *Ford v. Ford*, 6 Ha. 456; *Roe d. James v. Avis*, 4 T. R. 605. *Goodtitle d. Daniel v. Miles*, 6 East, 494, must be considered overruled.

4. If, however, none of the limitations of the will could take effect upon the reversion, there seems no reason for supposing the reversion would pass. *Tennent v. Tennent, supra*, is not *contra*, since the devise of the reversion was capable of taking effect so far as the life interest given to R. was concerned. *Goodtitle d. Daniel v. Miles, supra*, seems to have been decided upon this principle, though the facts did not justify its application. Whether a reversion passes if all the limitations are inappropriate.

5. And, of course, the reversion will not pass if the testator expressly treats it as undisposed of by his will; if, for instance, he treats the estates in which he has a reversion as descendible on failure of the prior limitations. *Strong v. Teatt*, 2 Burr. 912; 3 B. P. C. 219.

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## III. LEASEHOLDS FOR LIVES.

Leaseholds  
for lives.

The same rules are applicable to leaseholds for lives, which, being freehold interests, pass under a general devise though some of the limitations are inapplicable. *Fitzroy v. Howard*, 3 Russ. 225 ; *Weigall v. Broome*, 6 Sim. 99.

## IV. COPYHOLDS.

Copyholds.

By the statute 55 Geo. 3, c. 192, and sections 3 and 4 of the Wills Act, copyholds, whether surrendered to the use of the will or not, pass by a general devise. *Doe d. Clarke v. Ludlam*, 7 Bing. 275 ; 5 Moo. & P. 48.

The effect of section 3 of the Wills Act is only to dispense with the necessity for a surrender, and not to convey the estate into the devisee without admission. The estate therefore remains in the customary heir till admittance. *Garland v. Mead*, L. R. 6 Q. B. 441.

Equitable  
estates in  
copyholds.

Before the statute of 55 Geo. 3, equitable estates of copyholds which could not be surrendered could be devised by words of direct reference. *Allen v. Poulton*, 1 Ves. sen. 121 ; but they did not pass by a general devise of lands ; but now, as the evidence of intention to pass copyholds inferred from a surrender is unnecessary, it seems they would pass under a general devise. See *per* Lord Cranworth, in *Torre v. Browne*, 5 H. L. 555, 574.

And by the effect of the 3rd section of the Wills Act, a general devise of lands will pass copyholds, freed from the widow's right to freebench, in cases where the right could have been barred prior to the passing of that section by a surrender. *Lacey v. Hill*, 19 Eq. 346.

## V. LEASEHOLDS FOR YEARS.

Leaseholds  
for years  
before the  
Wills Act.

A general devise of lands before the Wills Act does not carry leaseholds for years if there are any freeholds ; on the other hand, if there are no freeholds, leaseholds may pass. *Rose v.*

*Bartlett*, Cro. Car. 292; *Thompson v. Lawley*, 2 B. & P. 303; Chap. XIX.  
*Gully v. Davis*, 10 Eq. 562.

Leaseholds will, however, pass under the description lands which the testator "then stood seised or possessed of, or in any way interested in." *Addis v. Clement*, 2 P. W. 456. Words of description applicable to leaseholds.

The word possessed is the important word, and leaseholds have been held not to pass under a similar devise without the word possessed. *Pistol v. Riccardson*, 2 P. W. 459 n.; *Davis v. Gibbs*, 3 P. W. 26.

The word farm will pass a leasehold as well as a freehold Farm. portion, unless it is restricted by the addition of "all other my freehold lands." *Lane v. Stanhope*, 6 T. R. 345; *Arkell v. Fletcher*, 10 Sim. 299; *Holmes v. Sayer Milward*, 47 L. J. Ch. 522. See *ante*, p. 93.

So, too, land held on lease and attached to a freehold house, passes under "messuages or tenements with the appurtenances." *Hobson v. Blackburn*, 1 M. & K. 571; *Doe v. Martin*, 2 W. Bl. 1148; see *Cuthbert v. Robinson*, 30 W. R. 366.

And leaseholds pass where the devise is to certain persons to hold for ever, or otherwise according to the natures and tenures thereof. *Hartley v. Hurle*, 5 Ves. 540; *Swift v. Swift*, 1 D. F. & J. 160.

The same result follows if the lands are described by acreage, which can only be satisfied by including leaseholds. *Goodman v. Edwards*, 2 M. & K. 759.

Since the Wills Act, however, leaseholds pass under a general devise of lands unless there is a contrary intention. General devise since the Wills Act.

Such a contrary intention is not shown by the fact that the "lands" in question are devised in strict settlement without any provision to prevent the leaseholds from vesting indefeasibly in the first tenant in tail at his birth. *Wilson v. Eden*, 11 B. 237; 5 Ex. 752; 14 B. 317; 18 Q. B. 474; 16 B. 153. Contrary intention.

But if there is a direction to accumulate the rents and profits during the minority of a tenant for life or in tail, and if he attains twenty-one to pay the accumulations to him, or if he dies under twenty-one to invest them in freehold land, to be settled to the same uses—a direction inconsistent with the absolute vesting of the leaseholds in a tenant in tail at birth,—and a power of

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Leaseholds  
will not pass  
under the  
term free-  
hold lands or  
real estate.

selling the "lands" and investing the proceeds in leaseholds, to be settled upon the same trusts, but so that they shall not vest in any tenant in tail dying under twenty-one, and there is a gift of the residuary personal estate upon trusts corresponding with the uses of the devised lands with the same proviso against absolute vesting, the testator by the provisions against the vesting of leaseholds in any tenant in tail dying under twenty-one shows that he would have inserted similar provisions in the devise of the "lands," unless he had intended leaseholds not to pass under that name. *Prescott v. Barker*, L. R. 9 Ch. 174.

A devise of "freehold" lands, or of "real" estate is not affected by the 26th section of the Wills Act. *Stone v. Greening*, 13 Sim. 390; *Emuss v. Smith*, 2 De G. & Sm. 722; *Turner v. Turner*, 21 L. J. Ch. 843; *Butler v. Butler*, 28 Ch. D. 66.

Under such a devise, therefore, leaseholds will pass only if there are no freeholds. *Day v. Trig*, 1 P. W. 286; *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1; *Gully v. Davis*, 10 Eq. 562.

In this respect the Wills Act, since which after-acquired freeholds might pass, will not prevent leaseholds from passing where there are no freeholds. *Nelson v. Hopkins*, 21 L. J. Ch. 410; *Gully v. Davis*, 10 Eq. 562; *Moose v. White*, 3 Ch. D. 763.

And where the testator was possessed of a leasehold interest, and also of the reversion in fee from the expiration of three years after the end of the term in certain premises, the whole interest has been held to pass under the word freehold. *Matthews v. Matthews*, 4 Eq. 278.

## VI. BENEFICIAL INTEREST IN A MORTGAGE.

Beneficial  
interest in  
a mortgage.

A general devise of lands will not without more pass the beneficial interest in a mortgage. *Strode v. Russell*, 2 Vern. 621, 624; *Casborne v. Scarfe*, 1 Atk. 605; see 2 J. & W. 194. See *Martin d. Weston v. Mowlin*, 2 Burr. 969, where the testator was mortgagee in possession.

But a devise of particular lands of which the testator is only mortgagee to several persons in succession, would, it seems, pass the beneficial interest, as something was clearly intended to

pass, and the limitations are inappropriate to a devise of the mere legal estate. *Woodhouse v. Meredith*, 1 Mer. 450. See, too, *Knollys v. Shepherd*, 1 J. & W. 499; *Clarke v. Abbott*, Barn. Ch. 457, 461. Chap. XIX.

Where the testator was owner in fee of a house subject to a lease, and at the same time mortgagee of the lease, the mortgage debt was held not to pass by a devise of "my freehold house." *Bowen v. Barlow*, 11 Eq. 454; 8 Ch. 171.

Rent charges upon a house which were conveyed on the occasion of the purchase by the testator of the lease to a trustee for him, would probably pass by a devise of the house. *Vallance v. Vallance*, 2 N. R. 229; see *Wilkes v. Collin*, 8 Eq. 338; *Swinfen v. Swinfen*, 29 B. 199, 204.

## VII. TRUST AND MORTGAGE ESTATES.

By section 30 of the Conveyancing and Law of Property Act, 1881, which applies to persons dying after the 31st of December, 1881, trust and mortgage estates vest in the personal representatives from time to time of the deceased, notwithstanding any testamentary disposition. Trust and mortgage estates.

The section applies to copyholds. *Re Hughes*, W.N. 1884, 53.

In cases where the section does not apply the following propositions are deducible from the cases:

A general devise to a person absolutely without more will pass the legal estate in property of which the testator is trustee or mortgagee. *Lord Braybrooke v. Inskip*, 8 Ves. 417. Legal estate in trust and mortgage estates.

There is, however, a distinction between cases where the testator is mortgagee in trust, and where he is also beneficially entitled to the mortgage money.

1. Where the testator has the legal estate in a mortgage, and the beneficial interest is also vested in him, the legal estate passes under a gift of "all the rest of my real and personal estate to A. for her own use and benefit," though there may be a charge of debts. *Re Stevens' Will*, 6 Eq. 597. In such a case it is reasonable to suppose that the beneficial ownership and the legal estate were meant to go together. Where the testator is mortgagee and beneficially entitled to the mortgage money.

If the devise is to trustees, subject to a charge of debts, appa-

Chap. XIX. rently the legal estate would not pass, the argument from the convenience of uniting the legal estate with the beneficial interest being away. *Re Horsfell*, M'C. & Y. 292.

This is *a fortiori* the case where the devise is to trustees subject to the payment of debts upon trusts inapplicable to the legal estate. See *Packman v. Moss*, 1 Ch. D. 215, where the testator was beneficially interested in a moiety of the equity of redemption.

But if the trustees are directed to get in debts due on any security, they take the legal estate. *Re Arrowsmith's Trusts*, 6 W. R. 642.

The legal estate will not pass where the devise is after payment of debts to two persons as tenants in common. *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.

Or where it is to several persons in definite shares, though not subject to debts. *Martin v. Laverton*, 9 Eq. 563.

Or where it is to an indefinite class, as tenants in common. *Re Finney's Estate*, 3 Giff. 465.

Mere trust estates.

2. Mere trust estates will not be prevented from passing under a general devise by words of benefit superadded. *Bainbridge v. Lord Ashburton*, 2 Y. & C. Ex. 347; *Sharpe v. Sharpe*, 12 Jur. 398; *Lewis v. Matthews*, L. R. 2 Eq. 177; and see *Ex parte Shaw*, 8 Sim. 159.

Charge of debts.

But they will not pass if there is a charge of debts, whether by express words or by implication from a residuary devise where legacies have been previously given. *Doe d. Reade v. Reade*, 8 T. R. 118; *Duke of Leeds v. Munday*, 3 Ves. 348; *Hope v. Liddell*, 21 B. 183; *In re Bellis' Trusts*, 5 Ch. D. 504. See, however, *In re Brown & Sibly*, 3 Ch. D. 156.

Trust for sale.

Nor where the devise is on trust for sale. *Ex parte Marshall*, 9 Sim. 555; *Re Cautley*, 17 Jur. 124; *Morley's Will*, 10 Ha. 293; *In re Smith's Estate*, 4 Ch. D. 70.

Nor where the devise is to uses in strict settlement. *Thompson v. Grant*, 4 Mad. 438.

Separate use.

As to whether a devise to the separate use will prevent trust estates from passing, see *Lindsell v. Thacker*, 12 Sim. 178.

Constructive trust.

3. Where a testator has contracted to sell real estate, so that he is a constructive trustee of the legal estate, it will pass

under a devise of trust estates, and not under a general devise upon trust for sale. *Lysaght v. Edwards*, 2 Ch. D. 499. *Purser v. Darby*, 4 K. & J. 41, only decides that where the estate contracted to be sold is specifically devised it is excepted from a general devise of trust estates. Chap. XIX.

If there is no devise of trust estates, the legal estate in lands contracted to be sold will pass under a general devise of real and personal estate upon trust to get in and dispose of the personalty, the legal estate being required for the purpose of the trust. *Wall v. Bright*, 1 J. & W. 494; *Lysaght v. Edwards*, 2 Ch. D. 499, 515.

But it will not if the devise is to tenants in common with limitations over. *Thirtle v. Vaughan*, 24 L. T. 5; 2 W. R. 632.

A devise of mortgaged estates on trust to get in the mortgage debts will not pass a legal estate which has descended to the testator as heir of a deceased mortgagee. *Ex parte Morgan*, 10 Ves. 100.

#### VIII. THE OPERATION OF A GIFT IN GENERAL TERMS UPON POWERS.

In wills before the Wills Act a general devise will not, as a rule, carry lands over which the testator has a general power of appointment. *Hoste v. Blackman*, 6 Mad. 190; *Roake v. Denn*, 4 Bl. N. S. 1. Effect of a general devise on powers before the Wills Act.

But the lands subject to the power will pass:

If there is a clear disposition of land, and the testator has at the time no other lands. *Standen v. Standen*, 2 Ves. jun. 589; 6 B. P. C. 193; *Denn v. Roake*, 6 Bing. 475; 5 B. & C. 732. As regards realty.

But there must be a clear disposition of lands, and not merely such general words as estate or property, though they would be sufficient to pass the proper lands of the testator. *Jones v. Curry*, 1 Sw. 66; *Evans v. Evans*, 23 B. 1.

The land subject to the power is allowed to pass only in order to give effect to the words of the will, and not because the testator has shown an intention to execute the power, and therefore only so much of the land subject to the power will be allowed to pass as is sufficient to give effect to the words of the

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will. Thus, if a testator has freeholds and a power of appointment over freeholds and copyholds, a devise of his freeholds and copyholds will pass only the copyholds and not the freeholds subject to the power. *Lewis v. Llewellyn*, T. & R. 104; *Napier v. Napier*, 1 Sim. 28.

But a gift of real and personal estate where the testator has no real estate, but has a power of appointing real and personal estate, will pass both the real and personal estate subject to the power. *Standen v. Standen*, 2 Ves. jun. 589; 6 B. P. C. 193.

Where a testator has power to devise lands, and at the same time to appoint a sum charged upon the land, a general devise, whether before or since the Wills Act, will not operate as an appointment of the sum so charged. *Clifford v. Clifford*, 9 Ha. 675.

As regards  
personalty.

These rules are not applicable to personalty, since, though the testator might not at the time of the bequest have possessed any property but that subject to the power which could have passed under the bequest, it would have been effectual with regard to after-acquired property.

Therefore, if there is at the testator's death any property upon which the words of general gift can take effect, the power will not be executed. *Jones v. Curry*, 1 Sw. 66; *Langham v. Nenny*, 3 Ves. 467; *Croft v. Slee*, 4 Ves. 60; *Bradley v. Westcott*, 13 Ves. 445; *Buckland v. Barton*, 2 H. Bl. 136; *Jones v. Tucker*, 2 Mer. 533.

If at his  
death the  
testator has  
no property  
but that sub-  
ject to the  
power.

It is also said that even if there be at the testator's death no other property upon which the general words can operate, the power will nevertheless not be executed. In all the cases, however, cited in support of this proposition, there was some property besides that subject to the power. See *supra*. In *Jones v. Tucker*, *supra*, which goes nearest to the point, there were apparently arrears of rent due to the testatrix at the time of her death; and see *Humphery v. Humphery*, W. N. 1877, 44; 36 L. T. N. S. 90.

On the other hand, a power vested in a married woman has been held to be executed by a general gift in her will when there was nothing else at her death upon which the gift could

operate (see *post*), and there seems to be no apparent reason why married women should in this respect differ from other persons. Chap. XIX.

With regard to realty, it is clear that where a married woman has a power to appoint realty, a general devise of her real and personal property will pass the estate subject to the power, there being nothing else upon which the devise can operate. *Curteis v. Kenrick*, 3 M. & W. 461; 9 Sim. 443; *Churchill v. Dibbin*, 9 Sim. 447 *n*. Power vested in a married woman.

Where the property subject to the power is personalty, the cases go to this:

1. Where a married woman has a power of appointment, and no other property at the date of the will, but at her death there is some separate estate upon which the will can operate, a general gift will not execute the power. *Lovell v. Knight*, 2 Sim. 275, affirmed on appeal. *Lemprière v. Valpy*, 5 Sim. 108; *Evans v. Evans*, 23 B. 1.

2. But if at her death there is nothing upon which the will can take effect, the power will be executed. *Shelford v. Acland*, 23 B. 10, where, however, the will was since the Wills Act. *A.-G. v. Wilkinson*, L. R. 2 Eq. 816. But *qu*. whether this would be the case with the will of a testator; see *supra*.

With regard to personalty, therefore, as also to realty, where the case is not within the exception above mentioned, in wills before the Wills Act, in order to execute a general power, there must be a reference either to the power or to the property subject to the power. In wills before the Wills Act, and in all cases of special powers, there must be a reference to the power or to the property subject to the power.

And the same is the case with special powers, whether before or since the Wills Act. *Wildbore v. Gregory*, 12 Eq. 482; *Harvey v. Harvey*, 23 W. R. 478.

Where the power is referred to, and only a portion of the fund subject to the power is specifically given, the rest will pass under a general gift of the residue. *Re Comber's Trust*, 14 W. R. 172.

1. What is a sufficient reference to a power.

A ratification of the trusts of the settlement creating a power is no evidence of an intention to execute the power. *Re Bingloe's Trust*, 26 L. T. N. S. 58. What is a sufficient reference to a power.

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A recital that a person is entitled to certain funds, over which the testator has a power of appointment, will not amount to an execution of the power in favour of that person. *Pennefather v. Pennefather*, I. R. 7 Eq. 300; see *Lees v. Lees*, I. R. 5 Eq. 549; see *In re Walsh's Trusts*, 1 L. R. Ir. 320.

A reference to a power as contained in a settlement of 1819, when the power was, in fact, contained in a resettlement of 1839, has been held a sufficient reference. *Re Wilmot*, 9 B. 644.

**General powers.**

Probably words referring to property over which the testator has any "disposing power," would be sufficient to execute a general power of appointment. See *Thornton v. Thornton*, 20 Eq. 599; *Cooke v. Cunliffe*, 17 Q. B. 245.

**Special powers.**

If the power is a special power, where there are words large enough to include everything belonging to the testator, the additional words, "or over which I have any power of disposition or control," may be referred to a special power if all the objects of the power are included in the gift, though the interest given may be larger than the power justifies, or though persons not objects of the power may be included as well. *Pidgely v. Pidgely*, 1 Coll. 255; *In re Teape's Trusts*, 16 Eq. 442; *Price v. Price*, 46 L. T. 228; *In re Swinburne*; *Swinburne v. Pitt*, 27 Ch. D. 696; see *Bruce v. Bruce*, 11 Eq. 371; *Bulteel v. Plummer*, 6 Ch. 160.

**Power created after the date of the will.**

This, however, does not apply to a power created after the date of the will, though the will may be subsequently republished. *Hope v. Hope*, 5 Giff. 13.

**"Beneficial" power.**

A devise of property over which the testator has any "beneficial" power will not execute a special power if the devise is in excess of the power. *Ames v. Cadogan*, 12 Ch. D. 868; see *Von Brockdorff v. Malcolm*, W. N. 1885, 148; 33 W. R. 934.

**Use of the words "my property."**

When there is a reference to the power either in direct terms or because there is nothing else to which the testator's words can apply, the fact that the property is described as "my property" will not exclude the property subject to the power from passing. *Harvey v. Strucey*, 1 Dr. 73, 115; *Bailey v. Lloyd*, 5 Russ. 330.

**Effect of a charge of debts.**

Nor will the fact that the bequest is made subject to the testator's debts, though the power may be a special power, where

there is other property to which the charge of debts can apply. Chap. XIX.

*Bailey v. Lloyd*, 5 Russ. 330; *Cowx v. Foster*, 1 J. & H. 30;

*Ferrier v. Jay*, 10 Eq. 550; *In re Teape's Trusts*, 16 Eq. 442.

*Clogstown v. Walcott*, 13 Sim. 523, is no longer law.

Whether a gift of property "over which I have any disposing power" without more will include property over which the testator has a special power of appointment seems doubtful. Gift of property "over which I have any disposing power."

It will not if there is an intention not to execute the power.

*Cooke v. Cunliffe*, 17 Q. B. 245.

In *Thornton v. Thornton*, 20 Eq. 599, a gift of "all my property over which I have any disposing power" to the testator's wife for life and then to his children, and in default of children to his wife's brothers and sisters, was held, *reddendo singula singulis*, to execute two powers of appointment—one in favour of the testator's wife, the other of his children.

And where under a non-exclusive power exercised prior to the passing of the statute, 37 & 38 Vict. c. 37, the testatrix gave legacies to three of the objects of the power, and then gave all the residue of her property of whatever kind, and over which she had any power of appointment, to the other objects of the power, the power was held well executed, the legacies to the objects of the power being charged on the residue. *Gainsford v. Dunn*, 17 Eq. 405. Gift of legacies to objects of the power charged upon the fund subject to the power.

So, too, where legacies are given to the objects of a power and the fund is then appointed to a person not an object of the power, subject to the legacies, the gift of the legacies operates as an appointment *pro tanto*. *Disney v. Crosse*, L. R. 2 Eq. 592.

2. Or again, a gift of the property subject to the power without reference to the power is sufficient to show an intention to execute the power. Reference to property subject to power.

But there must be no doubt on the face of the will that the testator is referring to some specific fund in existence at the time of making the will. There must be a reference to a specific fund.

Therefore, the fact that property of the same kind as that subject to the power is given merely in general terms—as, for instance, some particular kind of stock—will not execute the power, since the gift would be satisfied by purchasing the stock

Chap. XIX. in question. *Webb v. Honnor*, 1 J. & W. 352; *Mattingley's Trusts*, 2 J. & H. 427; see *In re Wait*; *Workman v. Petgrave*, 33 W. R. 930.

Nor will the fact that legacies are given equal in amount to the fund subject to the power. *Jones v. Tucker*, 2 Mer. 533; *Davies v. Thorns*, 3 De G. & S. 347; *Forbes v. Ball*, 3 Mer. 437, is explained in *Davies v. Thorns*.

Nor that legacies are given largely in excess of the testator's estate, unless the property subject to the power is included in it. *Lowe v. Pennington*, 10 L. J. Ch. 83.

The bequest of certain specific articles subject to the power will not be sufficient to make the rest of the property subject to the power pass by general words. *Hughes v. Turner*, 3 M. & K. 666.

On the other hand where the testator uses words showing that he is disposing of a specific fund, the power will be executed. *Lowndes v. Lowndes*, 1 Y. & J. 445; *Sayer v. Sayer*, 7 Ha. 381; 3 Mac. & G. 607; *Rooke v. Rooke*, 2 Dr. & S. 38; *David's Trusts*, Johns. 495; *Grutwicke's Trusts*, L. R. 1 Eq. 176; *Fletcher v. Fletcher*, 7 L. R. Ir. 40.

And this is the case though some of the persons in whose favour the power is exercised are incapable of taking. *Gratwicke's Trusts*, *supra*; *Bruce v. Bruce*, 11 Eq. 371.

Where a specific fund is referred to, the fact that the fund subject to the power is misdescribed, or that the donee purports to appoint under a different power, makes no difference. *Mackinley v. Sison*, 8 Sim. 561; *Bruce v. Bruce*, 11 Eq. 371.

In the same way, where a portion of the property subject to the power is excepted out of a general gift, the rest of the property subject to the power passes. *Walter v. Muckie*, 4 Russ. 76; *Reid v. Reid*, 25 B. 469.

Where the power was a special power and the testator gave legacies out of the funds subject to the power, and then gave the residue of his property "after payment of the legacies" to the objects of the power, the residue was held to include the property subject to the power. *Elliott v. Elliott*, 15 Sim. 321.

But a mere gift of the "residue of my personal estate and effects" to an object of the power would not have this effect. *Butler v. Gray*, 5 Ch. 26.

An express disposition of property settled subject to a power

of revocation and new appointment may have the effect of exercising the power of revocation. *Quin v. Armstrong*, 1. R. 11 Eq. 161. Chap. XIX.

Section 27 of the Wills Act enacts that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint, in any manner he may think proper, unless a contrary intention shall appear by the will. Effect of the 27 sect. of the Wills Act on general powers.

A general devise or bequest will not, under this section, execute a power of revocation and new appointment. *Pomfret v. Perring*, 18 B. 618; 5 D. M. & G. 775; *Palmer v. Newell*, 20 B. 32. Power of revocation.

A general devise of lands only will not exercise a power of appointment over the proceeds of sale of lands. *Adams v. Austen*, 3 Russ. 461.

A power to appoint by will only is a general power within the section. *Re Powell's Trust*, 18 W. R. 228; 39 L. J. Ch. 188. Testamentary power.

Special powers are not within the section. *Cloves v. Audry*, 12 B. 604; *Russell v. Russell*, 12 Ir. Ch. 377; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Humphery v. Humphery*, 36 L. T. N. S. 90; see, too, *Freme v. Clement*, 18 Ch. D. 499. Special powers.

The fact that the power is contained in a settlement made by the testator before the date of his will raises no presumption that the will was not intended to execute the power. *In re Clark's Estate; Maddick v. Marks*, 14 Ch. D. 422.

A contrary intention is not indicated by an express confirmation of the trusts of the instrument creating the power, where there is anything to which such confirmation can apply; as, for instance, other settled property or prior trusts of the property over which the testator has the power, though the property may be disposed of in default of appointment. *Lake v. Currie*, 2 D. M. & G. 536; *Hutchin v. Osborne*, 4 K. & J. 252; 3 De G. & J. 142. Contrary intention.

Nor by the fact that a life interest is given to a person when,

Chap. XIX. if that person survives the testator, the power will be gone. *Thomas v. Jones*, 2 J. & H. 475; 1 D. J. & S. 63.

But it has been held that a gift of property "not otherwise disposed of" does not execute a power where the property subject to the power is disposed of in default of appointment. *Moss v. Harter*, 3 Sm. & G. 458, *sed qu.*; see *Bush v. Cowan*, 9 Jur. N. S. 429; 11 W. R. 395.

Effect of a  
general be-  
quest upon  
powers.

By the same 27th section it is further enacted that in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint, in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Real estate  
sold.

Under this section a residuary bequest has been held to execute a power over real estate where the real estate had been sold under powers of sale and reinvestment in land, and the proceeds of sale transferred to the testatrix, who was the only person entitled to require the fund to be reinvested in land. *Chandler v. Pocock*, 15 Ch. D. 491; 16 Ch. D. 648. See *In re Kingston's Estate*, 5 L. R. Ir. 169.

And where a testator appointed under a general power certain settled estates and made a general bequest of personal estate, over which he had any power of appointment, it was held that the proceeds of portions of the settled estate sold with his consent before the date of the will passed under the general bequest of personal estate. *Gale v. Gale*, 21 B. 349; *Blake v. Blake*, 15 Ch. D. 481.

But if the fund is liable to be reinvested in land at the instance of a third person, it must be taken to be land and will not pass under a residuary bequest. *In re Greaves' Settlement Trusts*, 23 Ch. D. 313.

The section applies as well to a general residuary bequest as to a gift of a general pecuniary legacy. *Spooner's Trust*, 2 Sim. N. S. 129; *Clifford v. Clifford*, 9 Ha. 675; *A.-G. v. Brackenbury*, 1 H. & C. 782; *Hawthorn v. Sheddin*, 3 Sm. & G. 293; *Shelford v. Acland*, 23 B. 10; *Re Wilkinson*, 4 Ch. 587.

A direction to executors to pay the testator's debts out of his personal estate operates as an execution of a general power in favour of the executor. *Wilday v. Barnett*, 6 Eq. 193. Chap. XIX.  
Effect upon a  
general power  
of a direction  
to pay debts.

A simple direction to pay debts without the appointment of an executor would have the same effect. *Laing v. Cowan*, 24 B. 112.

But the mere appointment of an executor would probably not be enough. *Per Wickens, V.-C., In re Davies' Trusts*, 13 Eq. 166.

By the combined effect of sections 24 & 27, a general power may be exercised by a general gift in a will made prior to the instrument creating the power, and it is now settled that a general devise or bequest executes a general power contained in a settlement subsequently made by the testator, though the will thereby makes the whole settlement nugatory. *Boyes v. Cook*, 14 Ch. D. 53, overruling *In re Ruding's Settlement*, 14 Eq. 266; see, too, *In re Hernando*; *Hernando v. Sawtell*, 27 Ch. D. 284. Power exer-  
cised by will  
made previous  
to instrument  
creating  
power.

A subsequent power created by the testator will of course, *à fortiori*, be executed where the previous will expressly gives all property over which the testator has any power. *Patch v. Shore*, 2 Dr. & Sm. 589.

Or where the will expressly refers to the property, which is afterwards settled by the testator, who reserves to himself a power. *Stillman v. Weedon*, 16 Sm. 26; *Meredyth v. Meredyth*, I. R. 5 Eq. 565; *Cosfield v. Pollard*, 3 Jur. N. S. 1203.

The same is the case where the power, though existing at the date of the will, is then only contingent, being given to the survivor of two persons of whom the testator is one. *Thomas v. Jones*, 2 J. & H. 475; 1 D. J. & S. 63. See p. 68, *ante*. Contingent  
power.

Where the settlor and testator were the same person and the power was to be executed by a last will, and the testator made a will before and another after the creation of the power, the latter purporting to be his last will, it was held that the first will was not meant to be an execution of the power. *Pettinger v. Ambler*, L. R. 1 Eq. 510.

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Where the facts were first settlement, with power to appoint by deed or will, will referring to this power, second settlement under the power in the first, and creating a power to appoint by will, the will was held not to execute the power in the second settlement. *Thompson v. Simpson*, 50 L. J. Ch. 461.

Power  
created by  
third person.

It does not appear to have been decided that a mere general gift will execute a power subsequently given to the testator by third persons, though it would seem to follow upon principle.

But a general gift will not execute a power given to the testator by the will of a person who survives him. *Jones v. Southall*, 32 B. 31.

Whether an  
appointment  
takes the fund  
from the  
donees in  
default of  
appointment  
in all events.

An appointment to executors of a fund, over which the testator has a general power, takes the fund away from the donees in default of appointment, though some of the trusts declared by the testator may fail or trusts only exhausting part of the fund are declared. *Chamberlain v. Hutchinson*, 22 B. 444; *Keown's Estate*, 1 R. 1 Eq. 372; *Brickenden v. Williams*, 7 Eq. 310; *Wilkinson v. Schneider*, 9 Eq. 423; *Soriven v. Sandom*, 2 J. & H. 743; *In re Pinède's Settlement*, 12 Ch. D. 667; *In re Ickeringill's Estate*; *Hinsley v. Ickeringill*, 17 Ch. D. 151; *Blight v. Hartnoll*, 23 Ch. D. 218; see *Re Horton*; *Horton v. Perks*, 51 L. T. 420.

A mere direction to pay debts will only operate as an execution of the power *pro tanto*, and will not make the property subject to the power part of the testator's general estate. *Laing v. Cowan*, 24 B. 112.

The testator may show that he did not intend to make the fund part of his general estate. Thus, where the testatrix was a married woman separated from her husband, an appointment to trustees was held not to make the fund part of her estate, as it would in that case have vested absolutely in her husband, since being married she could only dispose of it under the power, and therefore all subsequent dispositions of it as her absolute property would have been void. *Hoare v. Osborne*, 12 W. R. 661; 33 L. J. Ch. 586; 10 Jur. N. S. 694; the case is, however, of no authority; see 48 L. J. Ch. 743, and 3 L. R. Ir. 240.

And in *Easum v. Appleford*, 5 M. & Cr. 56, the decision proceeded on the ground that the testatrix distinguished between her own property and that subject to the power, and at the same time intended to leave nothing undisposed of. Chap. XIX.

Possibly where the testator expressly gives the settled property for life only, a general residuary gift to the executors will not have the effect of taking the fund away from the persons entitled in default of appointment, so far as the trusts declared of the residue fail. *Bristow v. Skirrow*, 10 Eq. 1; see *In re De Lusi's Trusts*, 3 L. R. Ir. 232, 238.

A gift of residue directly to a donee, and not through the medium of a trust which, under the 27th section, operates as an appointment, will not take the fund subject to the power from the donee in default of appointment where the residuary gift lapses. *Re Davies' Trusts*, 13 Eq. 163; *In re De Lusi's Trusts*, 3 L. R. Ir. 232; see, too, *Biddulph v. Williams*, 1 Ch. D. 203; *In re Ickeringill*; *Hinsley v. Ickeringill*, 29 W. R. 500; 17 Ch. D. 151.

The rule applicable to personalty applies also to real estate, subject to a power, so that an appointment to trustees upon trust for a person, who predeceases the testator, takes the estate from the persons entitled in default of appointment. *In re Van Hagen*; *Sperling v. Rochfort*, 16 Ch. D. 18; *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238. Real estate  
subject to a  
power.

Where a general power of appointment over a fund is executed by will, the executors of the will are the proper persons to administer and give a discharge for the fund. *In re Philbrick's Trusts*, 13 W. R. 570; 34 L. J. Ch. 368; *Hayes v. Oatley*, 14 Eq. 1; *In re Hoskin's Trusts*, 5 Ch. D. 229; 6 *ib.* 281. Administra-  
tion of  
appointed  
fund.

It is however doubtful whether this rule applies in the case of a will of a married woman under a power, in cases not within the Married Woman's Property Act, 1882. See Davidson *Precedents*, vol. iv., p. 585.

In the case of a special power over a fund vested in trustees the testator cannot, without special authority, appoint new trustees of the fund by his will. The fund should, therefore, be administered by the original trustees. *Busk v. Aldam*, 19 Eq. 16; but see *Scotney v. Lomer*, 29 Ch. D. 535.

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**An appointment may take effect by way of devise.** A charge upon particular lands in favour of certain persons expressed by the testator to be made by virtue of a particular power and of all other powers enabling him, will operate by way of devise upon such interest as the testator has if the power is no longer subsisting at his death. *Sing v. Leslie*, 2 H. & M. 68.

## CHAPTER XX.

## RESIDUARY BEQUESTS.

## I. WHAT IS A RESIDUARY GIFT.

SUCH words as goods, chattels, or effects will, as a rule, pass the residuary personalty; no particular words are, however, necessary for that purpose. *Bland v. Lamb*, 2 J. & W. 399; *Hearne v. Wigginton*, 6 Mad. 120; *Fleming v. Burrows*, 1 Russ. 276; *Leighton v. Baillie*, 3 M. & K. 267; *In re Bassett's Estate*; *Perkins v. Fladgate*, 14 Eq. 54; see *In bonis Aston*, 6 P. D. 203. Chap. XX.  
No particular words necessary to pass the residue.

The question frequently arises whether words in themselves large enough to pass the residue, but coupled with an enumeration of particular things, will be cut down to pass only things *ejusdem generis* with those enumerated. Doctrine of  
*ejusdem generis*.

With regard to the meaning of *et cætera* following an enumeration of specific things, no precise rule can be laid down. The tendency of the most recent cases is to give the word the widest possible meaning, so that it would pass even real estate. *Chapman v. Chapman*, 4 Ch. D. 800; *Mullally v. Walsh*, 3 L. R. Ir. 244. Enumeration of particulars followed by *et cætera*.

On the other hand, in some of the earlier cases *et cætera* following an enumeration of particulars has been confined to things *ejusdem generis*. *Marquis of Hertford v. Lowther*, 7 B. 1; *Newman v. Newman*, 26 B. 220; *Barnaby v. Tassell*, 11 Eq. 363.

Where there are comprehensive words followed by an enumeration of particulars, an *et cætera* will not restrict the meaning of the large words. *Kendall v. Kendall*, 4 Russ. 360; *Gover v. Davis*, 29 B. 222. Large words followed by an enumeration of particulars.

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Large words, such as goods, chattels or effects, when they are followed by an enumeration of particulars, will not be limited to things *ejusdem generis*. *Fisher v. Hepburn*, 14 B. 627; *Patterson v. Huddart*, 17 B. 210; *Ellis v. Selby*, 7 Sim. 352; 1 M. & Cr. 286; *Swinfen v. Swinfen*, 29 B. 207; *Avison v. Simpson*, Jo. 43.

## Explanatory words.

The same is the case though the particulars are introduced by words intended to be explanatory of the former words, for instance, "namely," "consisting in," "together with," "such as," "both in," or similar words. *Bridges v. Bridges*, 8 Vin. Abr. Devise, 295, pl. 13; *Gover v. Davis*, 29 B. 222; *In bonis Goodyar*, 1 Sw. & Tr. 127; 4 Jur. N. S. 1243; *Mahoney v. Donovan*, 14 Ir. Ch. 262, 388; *Drake v. Martin*, 23 B. 89; *Dean v. Gibson*, 3 Eq. 713; *Maberley's Trusts*, 19 W. R. 522; *King v. George*, 4 Ch. D. 435; 5 *ib.* 627; *In re Fleetwood*; *Sidgreaves v. Brewer*, 15 Ch. D. 594; *Mullally v. Walsh*, 3 L. R. Ir. 244; see *Kendall's Trust*, 14 B. 608; *Tighe v. Fetherstonhaugh*, 13 L. R. Ir. 401. *Timewell v. Perkins*, 2 Atk. 103, is not to be followed.

And the words "whether in money or in the public funds or other securities of any sort or kind whatsoever," have an enlarging rather than a restrictive force, so far as personal property is concerned. *Cambridge v. Rous*, 8 Ves. 14; see *Reeves v. Baker*, 18 B. 372.

## Property in certain securities.

On the other hand, a gift of all the testator's property in certain securities is a gift of those securities only. *Enohin v. Wylie*, 1 D. F. & J. 410; 10 H. L. 1.

But such a gift may be enlarged to a residuary gift, if the testator goes on to state, that it is his intention to dispose of all his property among the legatees in question. *Patrick v. Yeatherd*, 12 W. R. 304.

## Express inclusion of things which would have passed without mention.

It seems that the express inclusion in the large words of some particular property, which would have passed without being expressly included, affords an argument for excluding from the gift things *ejusdem generis* with that included. *Steignes v. Steignes*, Mos. 296.

## Enumeration of particulars

General words following an enumeration of particulars will *prima facie* have their full force whether introduced by the word

"other" or not, if a restricted construction would cause an in- Chap. XX.  
testacy. *Arnold v. Arnold*, 2 M. & K. 365; *Swinfen v. Swinfen*,  
29 B. 207; *Campbell v. Prescott*, 15 Ves. 503; *Michell v.* preceding  
*Michell*, 5 Mad. 69; *Martin v. Glover*, 1 Coll. 269; *Parker v.* large words  
*Marchant*, 1 Y. & C. C. 290; *Nugee v. Chapman*, 29 B. 290; will not  
*Hodgson v. Jex*, 2 Ch. D. 122; see, too, *Re Lloyd's Estate*, 2 restrict the  
Jur. N. S. 539; *Everall v. Browne*, 1 Sm. & G. 368. latter.

The fact that specific and general legacies are given in later parts of the will is not sufficient to restrict the general words. *In bonis Shepheard*, 48 L. J. P. 62.

It is immaterial that certain things which would have passed under the previous words, if read in their large sense, are subsequently given to the same legatee. *Bennett v. Batchelor*, 1 Ves. jun. 63; 3 B. C. C. 27; *Fleming v. Burrows*, 1 Russ. 276.

It makes no difference, that the gift is not strictly residuary, so that there might possibly be property which it would be ineffectual to pass. *Hodgson v. Jex*, 2 Ch. D. 122.

The word article, however, has not the same large sense as goods or effects. *Collier v. Squire*, 3 Russ. 467.

But if it is clear that the gift was not meant to be residuary, and the large words, if not confined to things *ejusdem generis*, would carry the residue, they must be so confined. Large words  
confined to  
things ejusdem  
generis,

1. This is the case, if there is an express residuary gift. if there is  
another  
residuary gift,  
*Woolcomb v. Woolcomb*, 3 P. W. 112; *Stuart v. Marquis of Bute*, 1 Dow. 84; *Lamphier v. Despard*, 2 Dr. & War. 59; *Mullins v. Smith*, 1 Dr. & Sm. 204; *Campbell v. M'Grain*, I. R. 9 Eq. 397; *Waite v. Morland*, 13 W. R. 963; *Smith v. Davis*, 14 W. R. 942.

2. So when the residue has been given and the will is then revoked so far as relates to the bequest to the residuary legatee of the testatrix's plate, linen, household goods, and other effects, these words would be confined to things *ejusdem generis*. or it is clear  
that the gift  
in question  
was not  
meant to be  
residuary.  
*Hotham v. Sutton*, 15 Ves. 319.

If, however, the revocation is of the same enumerated things and "other effects (except money)," the testatrix shows that she considered things not *ejusdem generis* would be included, and the large words will have their full force. *Hotham v. Sutton*,

Chap. XX. 15 Ves. 326; *Iverson v. Gassiot*, 3 D. M. & G. 958; see *Steignes v. Steignes*, Mos. 296. *Fleming v. Brook*, 1 Sch. & Lef. 318, is inconsistent with *Hotham v. Sutton*.

So, too, if something stated to be a portion of certain specific property, together with the testator's household furniture and effects of what nature or kind soever, is given to a legatee, and the testator then makes other gifts, the earlier gifts being clearly not residuary will only pass things *ejusdem generis* with those enumerated. *Rawlings v. Jennings*, 13 Ves. 39.

And it would seem that where there is a gift of certain articles and all other goods of whatever kind to a legatee at the commencement of a will, followed by dispositions of other portions of the testator's property, and the remainder of the latter property is given to the same legatee, it is clear that the first gift was not meant to be residuary. *Wrench v. Jutting*, 3 B. 521.

So, too, a gift of the remainder of the testator's money and effects to be expended in purchasing a suitable present for his godson must be read as limited to things *ejusdem generis* with money. *Borton v. Dunbar*, 1 Giff. 221; 2 D. F. & J. 338; 30 L. J. Ch. 8.

3. Or, again, the testator may show by subsequent reference or explanation that he meant only things *ejusdem generis* to pass. *Sutton v. Sharp*, 1 Russ. 149; see *A.-G. v. Wiltshire*, 16 Sim. 38.

Bequest of  
things in a  
house.

In the case of a bequest of things in a house where the house is also given to the legatee, general words following an enumeration of particulars will more readily be limited so as to pass only things *ejusdem generis*.

The mention of one particular class of things, coupled with general words, will not cut down the general words.

Thus under a bequest of furniture and other movable goods in a house, money will pass. *Swinfen v. Swinfen*, 29 B. 207; *Mahony v. Donovan*, 14 Ir. Ch. 262, 388; *Cole v. Fitzgerald*, 3 Russ. 301.

On the other hand, if there is a long enumeration of particulars, such as furniture, plate, linen, and the like, followed by general words, the general words will be confined to things

*ejusdem generis*; so that, for instance, money in the house would not pass. *Trafford v. Berrige*, 1 Eq. Ab. 201, pl. 4; *Boon v. Cornforth*, 2 Ves. sen. 278; *Campbell v. M'Grain*, 1 R. 9 Eq. 397; *Watson v. Arundel*, 1 R. 10 Eq. 299; see *Dutton v. Hockenhull*, 22 W. R. 701. Chap. XX.

The argument in favour of a restricted construction of the general words is strengthened, if there is anything to show that the testator intended the chattels in question to be enjoyed with the house. *Gibbs v. Lawrence*, 7 Jur. N. S. 137; 30 L. J. Ch. 171; *Bradish v. Ellames*, 13 W. R. 128; 10 Jur. N. S. 1170, 1231.

The same is the case, if the things given are annexed to the house as heirlooms, a term implying durability. *Hare v. Pryce*, 12 W. R. 1072; *Fitzgerald v. Field*, 1 Russ. 427.

And in a similar gift the fact that a pecuniary legacy is given to the same legatee will prevent money in the house from passing as goods and chattels. *Roberts v. Kuffin*, 2 Atk. 113; *Anon.* Prec. Ch. 8. See, too, *ante*, p. 145.

## II. WHAT PASSES UNDER A RESIDUARY GIFT.

Gifts of residue may be either gifts of the residue of a particular fund or they may be general residuary gifts. Gifts of the residue of a particular fund may be either gifts of the residue of a fund over which the testator has a power of appointment, or of a fund created by the testator for the purposes of his will. Residue distinguished.

### 1. As to the residue of an appointed fund :

A gift of the residue of a fund over which the testator has a power of appointment, if not specific (see *ante*, pp. 105—107), passes shares in the fund the gift of which lapses or fails. *Falkner v. Butler*, Amb. 514; *Oke v. Heath*, 1 Ves. sen. 134. Residue of appointed fund.

This is the case, though the share in question may be directed to fall into the residue in certain events, which do not happen. *In re Meredith's Trusts*, 3 Ch. D. 757.

It appears to be immaterial that the residue is given only after deducting or after payment of the sums already appointed. *Falkner v. Butler*, Amb. 514; *Carter v. Taggart*, 16 Sim. 423; *In re Harries' Trust*, Joh. 199. Residue "after payment" of legacies.

**Chap. XX.** If it can be shown, that by the word residue the testator means no more than the precise sum which remains after the other gifts are provided for, the gift of the residue is in effect the gift of a specific sum, and will not carry lapsed shares. *In re Jeaffreson's Trusts*, 2 Eq. 276.

Specific  
residue.

The case of *Easum v. Appleford*, 10 Sim. 274; 5 M. & Cr. 56, if it can be supported at all, must be supported on these grounds. See, too, *Lakin v. Lakin*, 13 W. R. 704.

Residue of  
specific part  
of testator's  
own property.

2. As to the residue of a particular portion of the testator's own property:

Where a testator disposes of part of his lands in a particular parish to A. and devises the residue of those lands to B., the devise to B. is specific, and will not carry a lapsed share. *In re Brown's Trusts*, 1 K. & J. 522; *Springett v. Jennings*, 6 Ch. 533.

Residue of  
fund of  
personalty.

In the case of personalty, where the testator cannot be supposed to have in his mind the distinct portions of which the property is composed, different rules apply. Thus, if he disposes of a particular portion of his personalty, and then gives the residue of that portion, whether it is described as residue not otherwise disposed of or after payment of the sums previously given, the particular residue passes shares in the property which lapse or are invalidly given. *De Trafford v. Tempest*, 21 B. 564; *Aston v. Wood*, 43 L. J. Ch. 715; *Champney v. Davy*, 11 Ch. D. 949; see *Fee v. M'Manus*, 15 L. R. Ir. 31.

A gift of particular residue "not specifically bequeathed" will not carry lapsed portions of the property, if there is a general residuary bequest, though the latter may be given with precisely the same words. *Patching v. Barnett*, 28 W. R. 886, 890.

General  
residue and  
residue of a  
particular  
fund.

Upon the question whether a gift of a residue is a gift of the general residue or only of the residue of a particular fund, see *Ommaney v. Butcher*, T. & R. 260; *Legge v. Asgill*, *ib.* 265 n.; *Wrench v. Jutting*, 3 B. 521; *Boys v. Morgan*, 9 Sim. 289; 3 M. & Cr. 661; *Markham v. Ivatt*, 20 B. 579; *Jull v. Jacobs*, 3 Ch. D. 703.

3. As to a general residue:

General re-  
siduary gift.

A general residuary gift passes everything not disposed of, whether the testator has not attempted to dispose of it, or

whether the disposition fails by lapse or any other event. Chap. XX.  
*Bernard v. Minshull*, Johns. 276.

It also passes property attempted to be appointed. *Spooner's Trust*, 2 Sim. N. S. 129.

And a gift of general residue "not otherwise disposed of," or "not herein specifically bequeathed," will pass property not effectually disposed of. *Green v. Dunn*, 20 B. 6; *De Trafford v. Tempest*, 21 B. 564; *Patching v. Burnett*, 28 W. R. 886, 890.

A residuary gift has even been held to include property directed to be considered as part of the testator's personal estate, and to go in a due course of administration. *Scott v. Moore*, 14 Sim. 35.

Under a residuary devise, from which the testatrix excepted the lands subject to the uses of her marriage settlement, under which she took an ultimate remainder in fee, it was held that the remainder in fee in lands conveyed to the uses of the settlement subsequently to the date of the will passed. *Hughes v. Jones*, 11 W. R. 898; see *Torrens v. Millington*, 26 W. R. 753.

But the testator may show an intention not to include certain property in the residue by reciting, for instance, that it is settled in a particular manner, though it may not be so settled. *Circuitt v. Perry*, 23 B. 275; *Harris v. Harris*, 1 R. 3 Eq. 610; *Hawkes v. Longridge*, 29 L. T. N. S. 449.

Again, the terms in which the residue is given may exclude certain property from it.

Thus, if the testator declares his intention of disposing of certain property by codicil, a gift of residue "not reserved to be disposed of by codicil" does not pass the reserved property if no disposition is made of it. *Davers v. Dewes*, 3 P. W. 40.

So, too, though a "small" balance would include any balance that may happen to remain after making the payments directed by the testator, a bequest of the "small remainder" will not include interests that lapse. *Page v. Young*, 19 Eq. 501; *A.-G. v. Johnstone*, Amb. 576; see *Bland v. Lamb*, 2 J. & W. 399.

Where property is excepted from a residue, and the only object of the exception is to make a particular bequest, which fails, the excepted property falls into the residue. *Evans v.*

Intention to exclude certain property from the residue.

Residue limited by restrictive words.

"Small remainder."

Property excepted from residue.

Chap. XX. *Jones*, 2 Coll. 516; *Wingfield v. Newton*, cit. 2 Coll. 520  
*Thompson v. Whitelock*, 7 W. R. 625; 4 De G. & J. 490; see  
*Tatham v. Vernon*, 29 B. 604; *Torrens v. Millington*, 26 W. R.  
 753; *Blight v. Hartnoll*, 23 Ch. D. 218.

Similarly, if the exception can be read as intended only to exclude the property from a trust for sale to which the residue is subject, the property excepted passes to the residuary legatees. *James v. Irving*, 10 B. 276; *Dobson v. Banks*, 32 B. 259.

On the other hand, if the residue is given charged with debts, and certain property is exonerated from the charge and excepted from the residue, it will not pass with the residue on failure of the particular bequest. *Wainman v. Field*, Kay, 507.

Residue of  
residue.

Where the residue itself is distributed in certain shares, and a legacy is given out of one of the shares, followed by a disposition of the residue of such share, the legacy is undisposed of, if the legatee predeceases the testator. *Skrymsher v. Northcote*, 1 Sw. 566; *Lloyd v. Lloyd*, 4 B. 231.

So, where the residue is given as to one-fourth on trusts which fail, a gift of the residue of that residue will not carry the lapsed fourth. *Simmons v. Rudall*, 1 Sim. N. S. 115.

A bequest of residue beyond a sum of £10,000, directed to be set apart out of the residue, will not carry lapsed portions of the £10,000. *Green v. Pertwee*, 5 H. 249.

Revocation of  
share of  
residue.

Where the residue is given between several persons nominatim as tenants in common, and the gift to one of them is revoked, the gift of that share lapses, whether the revocation be of the share or of the trusts of the will, so far as they relate to the share. *Cresswell v. Cheslyn*, 2 Ed. 123; *Ramsay v. Sheldermine*, L. R. 1 Eq. 129; *Sykes v. Sykes*, 4 Eq. 200; 3 Ch. 301.

If a share is expressed to be revoked with a view to put the other residuary legatees on an equality with the one whose share is revoked, the revoked share passes to the others. *Vaudrey v. Howard*, 2 W. R. 32.

Where the residue is completely disposed of, and by a subsequent clause the testator directs that another person is to take a share, the effect of a revocation of the latter gift is to leave the earlier gift of the whole residue effectual. *Harris v. Davis*, 1 Coll. 416.

For the construction of a will where a residue was given to legatees in proportion to their legacies, and the testator by a codicil revoked some of the legacies, and gave other legacies in substitution for them, see *In re Courtauld's Estate*; *Courtauld v. Cawston*, W. N. 1882, 185; and see, too, *Hall v. Severne*, 9 Sim. 515.

A direction that a share of residue, the trusts of which fail or which is undisposed of, should fall into residue and be disposed of, or be held and applied, or be paid and divided accordingly, has in several cases been held insufficient to carry the share to the other residuary legatees or to prevent a lapse of any part of the share. *Humble v. Shore*, 7 H. 247; 1 H. & M. 550; *Lightfoot v. Burstall*, 1 H. & M. 546; *Re Bevis's Trusts*, 20 W. R. 359; *In re Barker's Estate*; *Hetherington v. Longrigg*, 15 Ch. D. 635; *In re Savage's Trusts*, 50 L. J. Ch. 131.

Direction that share of residue shall fall into residue.

In other cases, however, upon words which it would be very difficult to distinguish from those used in the cases above cited, it has been held that a share directed to fall into residue and be paid according to the trusts of the will, passes to the other residuary legatees. *Crawshaw v. Crawshaw*, 14 Ch. D. 817; *In re Rhoades*; *Lane v. Rhoades*, 29 Ch. D. 142.

It would seem that a share of residue, directed in certain events to sink into residue and be paid accordingly, might very well be divided in the same way as the residue. For instance, if the residue is given in thirds, the lapsed third would itself be divisible in thirds; and if the process could be continued *ad infinitum* the other residuary legatees would, in effect, take the whole. See *Evans v. Field*, 8 L. J. Ch. 264; *Atkinson v. Jones*, Joh. 246.

Where one of the residuary legatees dies and the testator, by codicil, confirms the will, except as to any legacy lapsed, it has been held that the share of the deceased legatee is undisposed of. *Re Mary Wood's Will*, 29 B. 236.

## CHAPTER XXI.

## CONVERSION.

## I. WHAT AMOUNTS TO A DIRECTION TO CONVERT.

**Chap. XXI.**

What  
amounts to a  
direction to  
convert.

PROPERTY directed to be converted is considered as that species of property into which it is to be converted, and passes to a legatee or devisee as if the conversion had actually taken place.

Direction that  
land is to be  
considered  
money or  
money land.

A direction that land is to be considered as money or *vice versa* will not work a conversion, but an actual change of one form of property into another must be intended. *Johnson v. Arnold*, 1 Ves. sen. 171; *A.-G. v. Mangles*, 5 M. & W. 120; *Edwards v. Tuck*, 23 B. 268; 3 D. M. & G. 40.

Direction to  
divide.

A direction to divide does not imply a conversion. *Cornick v. Pearce*, 7 Ha. 477; *Lucas v. Brandreth*, 28 B. 273.

But a direction to get together and divide among a large number of legatees property consisting of realty and personalty and previously described as scattered about and not realised, coupled with a direction to invest some of the shares, is in effect a direction to convert. *Mower v. Orr*, 7 Ha. 475.

Power to  
convert.

A mere power to convert will not effect a conversion. *Greenway v. Greenway*, 2 D. F. & J. 128.

Though if legacies payable in the ordinary course are to be paid after the conversion, the power is in effect a trust. *Burrell v. Baskerfield*, 11 B. 525.

Where a conversion is directed, the fact that the trustees have a discretion as to time will not alter the general rule. *Doughty v. Bull*, 2 P. W. 320; *In re Raw*; *Morris v. Griffiths*, 26 Ch. D. 60.

When conversion is to take place upon request the question Chap. XXI.  
is whether the conversion was intended to be made in all Conversion  
events, and the request is only an additional safeguard, or upon request.  
whether no conversion was intended till request.

If the conversion is to be upon request of certain persons, and the property is disposed of, whether converted or not, there is no conversion till the request. *Taylor's Settlement*, 9 Ha. 596; *Davies v. Goodhew*, 6 Sim. 585.

On the other hand, if there is a general intention to convert evidenced by the fact that the limitations are applicable only to the property as converted, and by the fact that the conversion is to be at the request of certain persons, or the survivor or the executors or administrators of the survivor, the property will be considered as converted. *Thornton v. Hawley*, 10 Ves. 129; see *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211.

Where there is an express trust to convert, a power to continue any government stocks and real securities will be confined to such as are of a permanent character. *Tickner v. Old*, 18 Eq. 422. Power to  
continue  
government  
securities  
where there is  
a trust to  
convert.

But where the trust was to convert such parts as should not be invested in the public funds or government securities, long annuities were held within the exception, and enjoyable in specie. *Wilday v. Sandys*, 7 Eq. 455.

Where trustees have an absolute discretion to convert or not, the property remains unconverted till the discretion is exercised. *Polley v. Seymour*, 2 Y. & C. Ex. 708; *Yates v. Yates*, 6 Jur. N. S. 1023; *Brown v. Bigg*, 7 Ves. 279; *Bourne v. Bourne*, 2 Ha. 35. Absolute  
discretion to  
trustees.

Similarly, where trustees have an option to convert either into realty or personalty, the property will be considered of that species into which the trustees convert it. *Van v. Barnett*, 19 Ves. 102; *Walker v. Denne*, 2 Ves. jun. 170; *Rich v. Whitfield*, L. R. 2 Eq. 583.

The option of the trustees may, however, be controlled by the general intention expressed in the will. Thus, if personalty is directed to be laid out in land or other security, and settled in the same way as realty devised by the will, the general intention that the real and personal estate are to go together, Discretion  
may be con-  
trolled by the  
context.

Chap. XXI. may override the option. *Earlom v. Saunders*, Amb. 241; *Hereford v. Ravenhill*, 5 B. 51; see *Minors v. Battison*, 1 App. C. 428.

And in such a case an ultimate limitation to the testator's right heirs, executors, and administrators will not prevent the property being considered as land with respect to the prior interests. *Cowley v. Harstonge*, 1 Dow. 361.

But where the will disposes only of personalty, the fact that the limitations are appropriate only to realty will not control the trustees' option so as to convert the personalty. *Evans v. Ball*, 30 W. R. 899.

The fact that personalty which trustees have an option to convert is given to a person, his heirs and assigns, is not sufficient to limit the option of the trustees. *Atwell v. Atwell*, 13 Eq. 23.

But if it is given to a person and his heirs for ever, the property will apparently be considered converted notwithstanding the option of the trustees. *Cookson v. Reay*, 5 B. 22; see 12 Cl. & F. 121.

## II. WHETHER CONVERSION IS DIRECTED FOR ALL THE PURPOSES OF THE WILL.

Direction that converted realty should form part of the personal estate.

1. Where realty is directed to be converted and form part of the personal estate, it will be subject to all the limitations of the personal estate, and will pass by the residuary bequest. *Kidney v. Coussmaker*, 1 Ves. jun. 436; *Robinson v. Governors of London Hospital*, 10 Ha. 19, 27; see *Bright v. Larcher*, 3 De G. & J. 148; *Field v. Peckett*, 29 B. 568; *quære*, whether *Collier v. Wakeman*, 2 Ves. jun. 683, would be followed.

But notwithstanding a direction that moneys to arise from a sale of realty are to be considered as part of the personal estate, they will not pass under a gift of the residuary personalty, if the residuary gift is followed by a gift of the moneys arising from the sale. *Amphlett v. Parke*, 4 Russ 75; 2 R. & M. 221.

Gift of the residue of the proceeds of sale of realty under the old law.

2. It seems clear that under the old law a gift of the residue of the proceeds of sale of realty fell under the same rule as an ordinary residuary devise, and did not carry legacies given out

of the proceeds, which failed through lapse or otherwise. *Jones v Mitchell*, 1 S. & St. 290 ; *Hutcheson v. Hammond*, 3 B. C. C. 128. Chap. XXI

3. Upon the question whether conversion is directed for all the purposes of the will, so that interests in the proceeds of sale of realty which are undisposed of or fail by reason of lapse or otherwise, are intended to pass by a general bequest of residuary personalty, the cases run into fine, though, perhaps, not irreconcilable distinctions.

Whether converted realty passes by a residuary bequest.

a. When conversion is directed at the death of a tenant for life, and the proceeds are to be divided among a class of persons who at that time may not be in existence, or may never come into existence ; for instance, such of the children of the tenant for life as attain twenty-one, conversion is not merely for the purpose of division, but for all the purposes of the will, and the property passes to the residuary legatee as personalty. *Wall v Colshead*, 2 De G. & J. 683.

Direction to convert at a certain time and divide among persons who may not then be in existence.

b. Where there is an absolute direction to sell realty not limited to any particular purpose, the surplus proceeds will pass to the residuary legatee. *Singleton v. Tomlinson*, 3 App. C. 404, affirming S. C. nom. *Watson v. Arundell*, 1 R. 11 Eq. 53.

Absolute direction to sell.

c. If the realty is to be sold for a particular purpose, for instance, to pay legacies, the surplus proceeds will not pass under a gift of residuary personalty. *Maugham v. Mason*, 1 V. & B. 410.

Sale for certain purposes.

d. Where realty and personalty are once for all blended together, and directed to be converted, interests undisposed of will pass to the residuary legatee. *Durour v. Motteux*, 1 Ves. sen. 320 ; 1 S. & St. 292 n. ; *Byam v. Munton*, 1 R. & M. 503 ; *Green v. Jackson*, 5 Russ. 35 ; 2 R. & M. 238 ; *Salt v. Chattaway*, 3 B. 576 ; *Spencer v. Wilson*, 16 Eq. 501 ; *Court v. Buckland*, 45 L. J. Ch. 214 ; *Norreys v. Franks*, 1 R. 9 Eq. 18. *Cruse v. Barley*, 3 P. Wms. 20, may probably be accounted for on the principle that the gift of residue there was not of a real residue, but of the residue of a real residue. The residue had in effect already been given among the testator's children, and the subsequent words only indicated what shares in that residue each was to take, and upon lapse of one of those shares a portion of the residue was thereby undisposed of.

Gift of a mixed fund to be converted.

Chap. XXI.

Realty directed to be converted the subject of a separate gift.

Realty and personalty blended but treated as distinct funds.

e. But when the realty directed to be converted and the personalty are the subject of separate gifts, and are treated as distinct funds, the residuary bequest will not carry interests undisposed of in the realty. *Maugham v. Mason*, 1 V. & B. 410; *Hutcheson v. Hammond*, 3 B. C. C. 128.

f. Intermediate between the last two classes of cases falls a class of cases where the real and personal estate are blended together, but the two funds are treated as distinct and independent, in which case the interests in the realty undisposed of will not pass to the residuary legatee.

Thus, though realty and personalty are blended together and directed to be converted, if the proceeds of the sale of the realty are treated as a separate fund for certain payments, interests undisposed of will not pass under the gift of the residuary personalty. *Dixon v. Dawson*, 2 S. & St. 327.

So, too, if there is a gift as well of the residue of the moneys to arise from the sale as of the residue of the personal estate, the latter residue will not carry legacies given out of the proceeds of sale which lapse. *Gravenor v. Hallum*, Ambl. 643; *Gibbs v. Rumsey*, 2 V. & B. 294.

But the fact that the residue of the money to arise from the sale of realty is expressly given will not prevent such money from passing under the residuary personalty, if the residue of the money is only mentioned as part of the enumeration of the things of which the residuary personalty consists. *Kennell v. Abbott*, 4 Ves. 802.

### III. CONVERSION IS LIMITED TO THE PURPOSES OF THE WILL.

Who is entitled to property directed to be converted but undisposed of by the will.

Conversion directed by a testator is a conversion only for the purposes of the will, and all that is not wanted for these purposes goes to the persons who would have been entitled but for the will. Therefore, where real and personal estate is directed to be sold, and after payment of debts and legacies the residue is given to persons, some of whom die before the testator, the lapsed shares go proportionally to the heir-at-law and next of kin. *Ackroyd v. Smithson*, 1 B. C. C. 503.

A declaration that the proceeds of the sale of realty are to be part of the personal estate for all purposes will not deprive the heir of such proportion of the proceeds of realty as is undisposed of, there being no express gift to the next of kin. *Shallcross v. Wright*, 12 B. 505; *Taylor v. Taylor*, 3 D. M. & G. 190; overruling *Phillips v. Phillips*, 1 M. & K. 649.

Chap. XXI.

Declaration that proceeds of sale of realty are to be personal estate.

Nor will a declaration, that the proceeds of the sale shall not lapse for the benefit of the heir, exclude the heir, if a disposition is intended to be made of the property. *Flint v. Warren*, 16 Sim. 134; *Fitch v. Weber*, 6 Ha. 145.

But if the surplus of the sale of real estate is directed to be personal estate, and given to the executors, they take in trust for the next of kin. *Countess of Bristol v. Hungerford*, 2 Vern. 645, corrected 3 P. Wms. 194.

The same rule applies to the case of money to be invested in land, which, upon failure of the particular dispositions, or any of them, results so far for the next of kin. *Cogan v. Stevens*, 5 L. J. Ch. 17; 1 B. 482, n.; *Hereford v. Ravenhill*, 1 B. 481; 5 B. 51; *Head v. Godlee*, Johns. 536; *Bective v. Hodgson*, 10 H. L. 656.

Money to be invested in land.

#### IV. HOW THE HEIR AND NEXT OF KIN TAKE PROPERTY DIRECTED TO BE CONVERTED.

1. When a conversion of realty is directed and the objects of the conversion wholly fail, the heir takes the property as realty, whether a sale has taken place or not. *Chitty v. Parker*, 2 Ves. jun. 271; but *quære* whether the question arose in this case. *Davenport v. Coltman*, 12 Sim. 610.

Where the purpose of the conversion wholly fails.

2. But were some purpose of the will can be answered by a sale, where, for instance, there is a tenant for life or one of several tenants in common who survives the testator, the heir takes the property as personalty. *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Mad. 484; *Wilson v. Coles*, 28 B. 215; *Hamilton v. Foote*, I. R. 6 Eq. 572.

Where it fails partially.

Upon this principle, where a sum is directed to be raised out of devised lands and is given for life with remainders, and the remainders fail, upon the death of the tenant for life the sum

Chap. XXI. charged belongs to the devisee of the land as personalty. *In re Newberry's Trusts*, 5 Ch. D. 746.

It would seem that where realty, directed to be converted, is only an auxiliary fund for payment of debts, and the personalty is sufficient to satisfy them, such realty will, on failure of all the other purposes, go to the heir as land. *Chitty v. Parker*, 2 Ves. jun. 271. (?)

But where realty and personalty are given together to be converted and charged with debts, so that the realty is applicable *pro rata*, the heir takes the realty as money on failure of all the other purposes of the conversion. *A.-G. v. Lomas*, L. R. 9 Ex. 29.

At what time it is to be ascertained whether the purposes have failed.

It has been said that the testator's death is the time at which it must be ascertained whether the purposes for which conversion is directed have failed or not, and therefore if at that time those purposes may possibly take effect, the heir takes as money, though they may subsequently fail. *Carr v. Collins*, 7 Jur. 165. The exact point, however, was not there decided, since, in that case, conversion was effectual with respect to the legacy of £1000.

Money to be laid out in land goes to the next of kin as land.

3. In the same way personalty laid out in land in pursuance of a direction in the will, but only partially disposed of, will go to the next of kin as land. *Curteis v. Wormald*, 10 Ch. D. 172, overruling *Reynolds v. Godlee*, Johns. 536, 582; *In re Skerrett's Trusts*, 15 L. R. Ir. 1.

#### V. CONVERSION AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

Conversion of residuary personalty given to several persons successively.

When there is no express trust to convert, but a residue of personalty is given *en masse* to several persons successively, wasting property, and property invested in a manner not authorised by the will, must be converted, unless it appears from the will that specific enjoyment by the tenant for life was intended. *Howe v. Lord Dartmouth*, 7 Ves. 137; *Johnson v. Johnson*, 2 Coll. 441; *Thornton v. Ellis*, 15 B. 193; *Macdonald v. Irvine*, 8 Ch. D. 101; see *Wightwick v. Lord*, 6 H. L. 217.

And in the same way the tenant for life is entitled to have reversionary property converted, though the reversion is

dependent upon his own life interest. *Wilkinson v. Duncan*, Chap. XXI. 23 B. 469; *Johnson v. Routh*, 3 Jur. N. S. 1041; 27 L. J. Ch. 305; *Countess of Harrington v. Atherton*, 3 D. J. & S. 352.

As to what is sufficient evidence of intention that the property left by the testator was to be specifically enjoyed: What will entitle the tenant for life to specific enjoyment.

Where the will contains the usual power to postpone conversion and a direction that the rents, profits and income until sale are to be applied in the same way as the income arising from the proceeds of sale, the tenant for life is entitled to the profits of a business carried on by the trustees. *In re Chancellor; Chancellor v. Brown*, 26 Ch. D. 42.

Cases where the residue is given to the testator's widow for the maintenance of herself and her children, and after her death to the children, are of course less strong in favour of conversion, than when the interests of tenant for life and remainderman are conflicting. *Wearing v. Wearing*, 23 B. 99; *Marshall v. Bremner*, 2 Sm. & G. 237. Interests of the successive takers not antagonistic.

So, too, where there is an absolute gift to a daughter, which is afterwards cut down by way of settlement to a life interest, there is a strong argument against conversion. *Vachell v. Roberts*, 32 B. 140. Settlement of an absolute interest.

The fact that the residuary gift includes real estate, the devise of which is specific, does not entitle the tenant for life to specific enjoyment of the residuary personalty. *Howe v. Lord Dartmouth*, 7 Ves. 137.

A discretionary power to convert, when trustees may think fit, does not entitle the tenant for life to the enjoyment of the property in specie in the meantime. *Wilkinson v. Duncan*, 23 B. 469; *Llewellyn's Trust*, 29 B. 171; *Yates v. Yates*, 28 B. 637; *Caldecott v. Caldecott*, 1 Y. & C. C. 312; *Meyer v. Simmenson*, 5 De G. & S. 723; *Brown v. Gellatly*, L. R. 2 Ch. 751; see *Simpson v. Lister*, 4 Jur. N. S. 1269. Discretionary power to convert when trustees may think fit.

Nor does a direction to convert from time to time for payment of debts imply that there is to be a conversion for no other purpose. *Caldecott v. Caldecott*, 1 Y. & C. C. 312, 737.

But an absolute discretion to sell "such parts and so much as should be necessary" to pay debts, affords an argument that the tenant for life is to enjoy specifically such parts as the

**Chap. XXI.** trustees do not sell. *In re Sewell's Estate*, 11 Eq. 80; see *In re Leonard*; *Theobald v. King*, 29 W. R. 234.

And if a discretion to convert is given, "notwithstanding" the gift to the tenant for life, the tenant for life will be entitled in specie till conversion. *Burton v. Mount*, 2 De G. & Sm. 383.

The tenant for life is entitled in the meantime, if there is a direction to pay the produce of any portion not converted to him. *Johnston v. Moore*, 27 L. J. Ch. 453; *Mackie v. Mackie*, 5 Ha. 70; *Wrey v. Smith*, 14 Sim. 202; *Morley v. Mendham*, 2 Jur. N. S. 998; *Lean v. Lean*, 23 W. R. 484; *Miller v. Miller*, 13 Eq. 263.

An express power to sell realty affords no argument for the specific enjoyment of wasting securities. *Jebb v. Tugwell*, 20 B. 84.

A power to retain investments would not entitle the tenant for life to specific enjoyment. *Porter v. Buddleley*, 5 Ch. D. 542.

But a power to retain investments, or to sell and invest the proceeds on such securities as the trustees think proper, has been held sufficient to give the tenant for life specific enjoyment. *Gray v. Siggers*, 15 Ch. D. 74.

Where the gift is not of a residue simply but of specific enumerated things.

The tenant for life will be entitled to enjoy the property in specie as it existed at the death of the testator, where the gift is not merely of a residue, but there is an enumeration of certain specific things. *Lord v. Godfrey*, 4 Mad. 455; *Vaughan v. Buck*, 1 Ph. 75; *Vincent v. Newcombe*, Young, 599; *Blann v. Bell*, 2 D. M. & G. 775; *Hood v. Clapham*, 19 B. 90; *Bowden v. Bowden*, 17 Sim. 65; *Boys v. Boys*, 28 B. 436; *Pickering v. Pickering*, 4 M. & Cr. 289; *Thursby v. Thursby*, 19 Eq. 395. *Mills v. Mills*, 7 Sim. 501, is not easily reconcilable with the other authorities.

And in such a case the fact that a discretionary power to, convert is given makes no difference. *Simpson v. Lister*, 4 Jur. N. S. 1269; *Bethune v. Kennedy*, 1 M. & Cr. 114; *Hubbard v. Young*, 10 B. 203; *Thursby v. Thursby*, *supra*.

The argument, however, in favour of specific enjoyment of things expressly enumerated is less strong where the gift is through the medium of a trust. *Craig v. Wheeler*, 29 L. J. Ch. 374; 8 W. R. 172.

On the other hand, notwithstanding a partial enumeration of specific things, the gift may in effect be merely residuary. *Sutherland v. Cooke*, 1 Coll. 894, where the gift was of "all my money in the Long Annuities, and in all or any other of the public stocks or funds, ready money and securities for money, outstanding debts, and all the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever, and of what nature or kind soever the same shall or may consist at the time of my decease, not hereinbefore specifically disposed of," to trustees, who were directed by sale thereof, or of so much as should be necessary to pay debts, &c. Chap. XXI.

Again, though the gift may be of a pure residue, the testator may show that he contemplates specific enjoyment. When the gift is of residue simply there may be an intention to give specific enjoyment.

In a will before the Wills Act, if the tenant for life is to take the rents, issues, and profits, he will be entitled to the specific enjoyment of leaseholds, if there are no freeholds to which the term rents may apply. *Goodenough v. Tremamondo*, 2 B. 513; *Cafe v. Bent*, 5 Ha. 24.

But in wills since the Wills Act the word rents, by itself, will not have this effect where it is used with other words, none of which have the same specific force. *Pickup v. Atkinson*, 4 Ha. 624; see, too, *Booth v. Coulton*, 7 Jur. N. S. 207. Use of the words rents and profits.

If the property is specifically given over at the death of the tenant for life, he is entitled to enjoyment in specie. *House v. Way*, 12 Jur. 958; 18 L. J. Ch. 22; *Harris v. Poyner*, 1 Dr. 174; *Collins v. Collins*, 2 M. & K. 703; *Daglie v. Fryer*, 12 Sim. 1. Gift over of the property in specie at death of the tenant for life.

A gift of a specific part of the residue at the death of the tenant for life will entitle the tenant for life to the specific enjoyment of that part. *Holgate v. Jennings*, 24 B. 623; *Macdonald v. Irvine*, 8 Ch. D. 101.

But this is not the case if the gift at the death of the tenant for life is a mere general gift, though it may be of something which forms part of the residue at the testator's death. *Lichfield v. Baker*, 2 B. 481; 13 B. 447.

An express trust to convert at the death of the tenant for life entitles the tenant for life to specific enjoyment. *Alcock v. Slopers*, 2 M. & K. 699; *Harvey v. Harvey*, 5 B. 134; *Daniel v. Warren*, 2 Y. & C. C. 290; *Rowe v. Rowe*, 29 B. 276. Express trust to convert at the death of the tenant for life.

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And where the conversion of a portion is expressly postponed for a certain time, the tenant for life is entitled to specific enjoyment in the meantime. *Green v. Britten*, 1 D. J. & S. 649.

Power to sell with consent of the tenant for life or to renew leaseholds.

Similarly the tenant for life is entitled where there is a power to sell with his consent, or to renew leaseholds. *Hinves v. Hinves*, 3 Ha. 611; *Hind v. Selby*, 22 B. 373; *Skirving v. Williams*, 24 B. 275; *Crowe v. Crisford*, 17 B. 507.

Debts must be got in.

Where the tenant for life is entitled to the enjoyment in specie of the property of the testator as existing at his death, the debts must nevertheless be got in. *Holgate v. Jennings*, 24 B. 623.

## VI. CONVERSION BY EVENTS EXTRANEIOUS TO THE WILL.

Effect upon the will of a contract for sale.

Where there is a devise of lands, whether by words of specific or general description, and the testator afterwards sells the lands, the purchase-money falls into the personal residue. And an option to purchase, given by the testator after the date of his will and exercised after his death, has the same effect. *Weeding v. Weeding*, 1 J. & H. 424.

And where the option to purchase is given before the date of the will, the effect is the same. *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Gould v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116; *Collingwood v. Row*, 26 L. J. Ch. 649; see *Edwards v. West*, 26 W. R. 507.

*Drant v. Vause*, 1 Y. & C. C. 580; *Emuss v. Smith*, 2 De G. & Sm. 722, are not easily reconcilable with the other authorities. See Dart, V. & P. 263, and *Cooper v. Martin*, L. R. 3 Ch. 47.

It makes no difference that the purchase-money is payable to the testator, his heirs, or assigns. *Townley v. Bedwell*, *supra*; *Weeding v. Weeding*, *supra*.

The case would be different, if the purchase-money is made payable to the owner of the land. *In re Graves' Minors*, 15 Ir. Ch. 357.

The principle of the cases above cited would probably not be extended to a bequest of leaseholds where the lease is determinable upon notice and payment of compensation. In

such a case the legatee has been held entitled to the compensation awarded. *Coyne v. Coyne*, 1. R. 10 Eq. 496. Chap. XXI.

Since the Act 40 & 41 Vict. c. 34 which applies to testators dying after the 31st December, 1877, if a testator contracts to buy realty and dies before the purchase is completed and the vendor has a lien for the purchase-money, it seems that the purchase-money as between persons entitled to the real and personal estate is to be borne by the realty purchased. *In re Cockcroft*; *Broadbent v. Groves*, 24 Ch. D. 94. Contract to purchase realty.

In cases not within that Act, if there is a contract to purchase realty, which is binding on the testator at his death, the purchase-money is converted into realty, and the heir or devisee is entitled to it, though the vendor may retain a power of rescission which is actually exercised after the testator's death. *Whittaker v. Whittaker*, 4 Bro. C. C. 30; *Garnett v. Acton*, 28 B. 333; *Hudson v. Cook*, 13 Eq. 417.

If, however, the contract is not binding on the testator there is no conversion. *Broome v. Monck*, 10 Ves. 597.

If the heir adopts and carries into effect a parol contract of the testator the land is converted, and he is not entitled to the purchase-money. *Frayne v. Taylor*, 12 W. R. 287; 33 L. J. Ch. 228.

If the testator has contracted with a builder for the building of a house on a piece of land devised by him, the devisee is entitled to have the contract performed out of the personal estate, whether the Court would decree specific performance of the contract or not. *Cooper v. Jarman*, 3 Eq. 98; see *Re Tunn*, 7 Eq. 434. Contract to build a house.

The devisee is not entitled to interest on the purchase-money pending the completion of a contract to purchase land. *Puxley v. Puxley*, 1 N. R. 509.

Where certain property is after the date of the will converted into personalty by Act of Parliament, the property passes as personalty, though the conveyances required by the Act may not have been executed. *Cadman v. Cadman*, 13 Eq. 470; see *Frewin v. Frewin*, 10 Ch. 610. Conversion under statutory powers.

A notice to treat under the Lands Clauses Act, followed by an agreement as to the price to be paid, converts the lands in Notice to treat.

Chap. XXI. question, though there may be no sufficient contract under the Statute of Frauds. *Ex parte Hawkins*, 13 Sim. 569; *Re Manchester and Southport Railway*, 19 B. 365; *Watts v. Watts*, 17 Eq. 217.

A mere notice to treat is not sufficient to effect a conversion, nor is a notice to treat followed by a statement on the part of the vendor of the sum he is willing to take, if he dies before it has been accepted. *Haynes v. Haynes*, 1 Dr. & Sm. 426; *Re Battersea Park Acts*; *Ex parte Arnold*, 32 B. 591; see *Coyne v. Coyne*, I. R. 10 Eq. 496.

And an agreement, if land is taken under compulsory powers, to pay so much an acre for it, will not cause conversion. *Ex parte Walker*, 1 Dr. 508.

In cases where conversion takes place the devisee is, under section 23 of the Wills Act, entitled to the rents between the testator's death and the completion of the purchase. *Watts v. Watts*, 17 Eq. 217.

On the same principles, where realty has been rightfully converted, whether by a trustee in bankruptcy or under an order of the Court, it passes as personalty, and in the latter case the conversion is held to take place as from the date of the decree. *Banks v. Scott*, 5 Mad. 493; *Steed v. Preece*, 18 Eq. 192; *Arnold v. Dixon*, 19 Eq. 113; *Hyett v. Mekin*, 25 Ch. D. 735.

Where more than was necessary has been sold under a decree, for instance for payment of a mortgage debt, the surplus retains its former character. *Cooke v. Dealey*, 22 B. 196; *Jermyn v. Preston*, 13 Sim. 356; *Scott v. Scott*, 9 L. R. Ir. 367; but see *Steed v. Preece*, *supra*.

Conversion  
into fee  
simple of  
renewable  
leaseholds  
held in *quasi*  
tail.

As to the effect of the conversion of renewable leaseholds for lives and years held in *quasi* tail into a fee under statutory powers, see *Morris v. Morris*, I. R. 6 C. L. 73; *ib.* 7, p. 295; *In re Dane's Estate*, I. R. 10 Eq. 207; *Batteste v. Maunsell*, I. R. 10 Eq. 314.

## CHAPTER XXII.

GIFTS TO PERSONÆ DESIGNATÆ AND TO PERSONS  
FILLING A CERTAIN CHARACTER.

I. For the purpose of ascertaining the persons to take under certain names and descriptions, evidence is admissible: firstly of all the facts known to the testator at the time of making his will; secondly, of any peculiar names or phrases which the testator was in the habit of using, whether nicknames or names erroneously applied to certain objects, provided in the latter case there are no persons to whom the names correctly apply, and for this purpose any documents or writings of the testator, including a prior will, are admissible. *Reynolds v. Whitan*, 16 L. J. Ch. 434; see *Feltham's Trusts*, 1 K. & J. 532; *Gregory's Will*, 34 B. 600. Chap. XXII.  
What  
evidence is  
admissible.

Evidence is also admissible of the objects the testator was likely to benefit: evidence, for instance, to which of two societies, both insufficiently answering a certain description, the testator was in the habit of subscribing. *Kilvert's Trusts*, 12 Eq. 183; 7 Ch. 170.

If among the objects thus shown to be known to the testator there is some one who fully answers the description in the will, evidence to show that another person was meant is not admissible. *Delmare v. Robello*, 1 Ves. jun. 412; 3 B. C. C. 446; *Holmes v. Custance*, 12 Ves. 279; *In bonis Peel*, 2 P. & D. 46. Person fully  
answering  
the descrip-  
tion will take  
as persona  
designata.

A legatee is sufficiently described by his first Christian name, or even by initials. *Mostyn v. Mostyn*, 5 H. L. 155; *Abbot v. Massie*, 3 Ves. 148.

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But not if  
he was un-  
known to the  
testator.

It is, on the other hand, perfectly clear that the mere fact of a person fully answering to the description in the will (the description being of a *persona designata*) will not entitle him to take under it if it appears from the admissible evidence that the testator was not aware of his existence. Therefore, under a gift to Elizabeth, daughter of Mary Beynon, or to my nephew Joseph, neither Elizabeth, an illegitimate daughter, nor a nephew called Joseph, will take if it appears that the testator was not aware of their existence. *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; *Grant v. Grant*, L. R. 5 C. P. 380, 727.

Evidence of  
nickname,  
&c., is  
admissible.

The testator may have habitually called certain persons or things by peculiar names by which they are not commonly known, and of this evidence is admissible; thus, where the gift was to Catherine Earnley, evidence was admitted to show whom the testator was in the habit of calling by that name. *Beaumont v. Fell*, 2 P. Wms. 141; *Masters v. Masters*, 1 P. Wms. 421; *Dowset v. Sweet*, Ambl. 175; *Lee v. Pain*, 4 Ha. 251; *Kell v. Charmer*, 23 B. 195.

But not  
evidence to  
explain a  
patent  
ambiguity.

But if the testator merely designates legatees by letters having no reference to their names, there is a patent ambiguity which may not be explained by evidence. *Clayton v. Nugent*, 13 M. & W. 200; *Sullivan v. Sullivan*, I. R. 4 Eq. 457.

Blanks may  
not be  
supplied.

Where a blank is left for the name of a legatee, no evidence of intention is admissible, and the gift is void for uncertainty. *Winn v. Littleton*, 2 Ch. Ca. 51; *Baylis v. Attorney-General*, 2 Atk. 239; *Hunt v. Hort*, 3 Bro. C. C. 311; *Taylor v. Richardson*, 2 Dr. 16.

Where, however, there is a clear gift to a certain class, and an intention is expressed of including or excluding certain persons whose names are left in blank, the clause of inclusion or exclusion only is void for uncertainty, and the gift to the class is good. *Illingworth v. Cooke*, 9 Ha. 37; *Gill v. Bagshaw*, L. R. 2 Eq. 746.

But if the testator goes on to define the class by name, and inserts the names of persons who cannot alone be said to constitute the class, leaving blanks for other names, the gift is void for uncertainty; for instance, if the gift be to my nephews and nieces, John and Nanny, followed by a blank, John and Nanny

not satisfying the description nephews and nieces. *Greig v. Chap. XXII. Martin*, 5 Jur. N. S. 329.

The fact that a blank is left for the Christian name, or for the surname, of the legatee will not avoid the legacy if there is no doubt to whom the rest of the name applies. *Price v. Page*, 4 Ves. 680; *Phillips v. Barker*, 1 Sm. & G. 582, where the gift was to — Davis, daughter of S. Davis, and the testator knew only of one daughter at the date of the will. *In bonis De Rosaz*, 2 P. D. 66; see *Re Gregson's Trusts*, 12 W. R. 935.

II. Where the legatee is inaccurately named or described, so that there is no one who fully answers the name or description, the Court will if possible gather from the contents of the will and the surrounding circumstances who was meant. *Ryall v. Hannam*, 10 B. 536; *Camoy's v. Blundell*, 11 Sim. 467; 1 Ph. 279; 1 H. L. 778; *Stringer v. Gardiner*, 27 B. 35; 4 De G. & J. 468; *Douglas v. Fellows*, Kay, 114; *Dooley v. Mahon*, I. R. 11 Eq. 299; *In re Twohill*, 3 L. R. Ir. 21; *Patching v. Barnett*, 28 W. R. 886; *In bonis Brake*, 6 P. D. 217; *Baxter v. Morgan*, 7 L. R. Ir. 501.

Inaccurate description.

In determining whether a legatee fully answers the description, the whole will must be considered. Thus though there may be a person precisely answering to the name given by the testator, it may appear from other parts of the will that that person could not have been intended. *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364; *In re Wolverton Mortgaged Estates*, 7 Ch. D. 197.

The fact that a legatee has once been accurately described will not prevent his taking another gift under a less full or an inaccurate description. *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235; *Careless v. Careless*, 19 Ves. 604; 1 Mer. 384.

But it will if the two descriptions are so different as to raise a strong probability that the same legatee cannot have been meant. *Lee v. Pain*, 4 Ha. 254.

If a legatee is mentioned by name and an erroneous description is added, the name will prevail if there is a person fully answering to the name and no one to answer the description. *Veritas nominis tollit errorem demonstrationis*. *Standen v. Standen*, 2 Ves. jun. 589; 6 B. P. C. 193; *Doe d. Gains v.*

Name accurate, superadded description inaccurate.

Chap. XXII. *Rouse*, 5 C. B. 442; *Re Blackman*, 16 B. 377; *Re Ingle's Trusts*, 11 Eq. 578.

Name inaccurate, superadded description accurate.

Similarly, if there is no one to answer the name, a person satisfying the description will take. *Pitcairne v. Brase*, Finch, 403; *Dowset v. Sweet*, Amb. 175; *Parsons v. Parsons*, 1 Ves. jun. 266; *Garth v. Meyrick*, 1 B. C. C. 30; *Doe d. Cook v. Danvers*, 7 East, 229.

Equivocation.

III. If there are several persons who accurately answer the whole description, there is an equivocation, and evidence of the testator's intention is admissible. *Lord Cheney's Case*, 3 Rep. p. 137, fol. 68a.; *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235; *Doe d. Gord v. Needs*, 2 M. & W. 129; *Doe d. Allen v. Allen*, 12 A. & E. 451; *Jones v. Newman*, 1 W. Bl. 60; *Jefferies v. Michel*, 20 B. 15.

And if part of the description applies equally to two persons and the rest of it applies to no one, the portion which has no application may be considered away, so as to raise an equivocation and make evidence of intention admissible. *Price v. Page*, 4 Ves. 680; *Still v. Hoste*, 6 Mad. 192; *Careless v. Careless*, 19 Ves. 604; 1 Mer. 384. These cases are referred to this head by Lord Abinger, C.B., in *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363, 370; but *quære* whether *Price v. Page* was not a case of equivocation strictly, and whether the latter two cases were not mere cases of misdescription. At any rate, in them no evidence of intention proper was offered, but only evidence of surrounding circumstances.

Equivocation may arise though two persons may not both answer the same description with equal accuracy.

To raise a case of equivocation it is sufficient, if two persons equally answer the description in a popular sense.

Thus a father and son both equally answer the description John Smith, though properly speaking the son is John Smith the younger. *Jones v. Newman*, 1 W. Bl. 60.

So a person whose name was W. M. and one whose name was W. J. R. B. M. were both held equally to answer the description W. M., since a man is popularly known by his first Christian name. *Bennett v. Marshall*, 2 K. & J. 740.

The will may on the face of it raise a case of equivocation.

It makes no difference that the will itself shows that there are two persons equally answering a given description. For instance, if there is a gift to G. G., son of J. G., another to G. G.,

son of G. G., and a third to G. G., son of G. *Doe d. Gord v. Needs*, 2 M. & W. 129. Chap. XXII.

But parol evidence is not admissible to show to which of two antecedents in the will a word of reference is to be referred, if, for instance, two Ann Collins's have been mentioned, and there is a gift to the said Ann Collins. *Fox v. Collins*, 2 Ed. 107; *Castledon v. Turner*, 3 Atk. 257.

No case of equivocation arises if it can be gathered from the will which of several persons equally answering the name is meant, as in a devise to M. W., my brother, and to Simon, my brother's son—the son of the brother just mentioned being clearly indicated. *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57; *Healy v. Healy*, I. R. 9 Eq. 418. An apparent case of equivocation may be explained by the will itself.

And, similarly, if a legatee has once been accurately described, and the same name is afterwards mentioned without the description, evidence is not admissible to show that a different legatee of that name was meant. *Webber v. Corbett*, 16 Eq. 515; *Richardson v. Watson*, 4 B. & Ad. 787.

But the case is different if there is first a gift to A. B. and then a gift to A. B. of X., and there are two A. B.'s, one of X. and one not. *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235.

Further, it is clear that if there were a gift to my "nephews" as a class, evidence that the testator generally applied the term to his wife's nephews would not raise a case of equivocation so as to make evidence of intention admissible as between nephews proper and wife's nephews. *Beachcroft v. Beachcroft*, 1 Mad. 430, which may be cited to the contrary, so far as it cannot be upheld *ex visceribus* of the will, has been generally disapproved. Whether nephews proper and a wife's nephews are both equally nephews.

It is equally clear that if the testator at the date of his will had only a wife's nephew called Joseph, the subsequent birth of a brother's son called Joseph would not entitle the latter to take under a gift to my nephew Joseph. And the result would be the same if the testator at the date of his will was not aware that his brother had a son called Joseph. *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; *Grant v. Grant*, L. R. 5 C. P. 380, *ib.* 727. My nephew Joseph is clearly *persona designata*, and the question then is, whom did the testator mean to point out?

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Evidence of intention, though in fact admitted in *Grant v. Grant*, was not necessary for the decision, since the testator cannot have meant to benefit a person of whose existence he was not aware, under a particular name and description, and therefore a case of equivocation cannot be said there to have arisen.

Whether evidence of intention would be admissible if the testator was aware at the date of his will that both his brother and his brother-in-law had sons called Joseph is doubtful, though the judgment in *Grant v. Grant* seems to imply that it would.

Case where  
part of a  
description  
applies to one  
person and  
part to  
another.

IV. If there is a gift by name, with a particular description superadded, and there is some one who answers to the name and some one who answers to the description, no evidence of intention is admissible. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; *Bernasconi v. Atkinson*, 10 Ha. 345; *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364.

In some cases, if there is nothing to point out one person more than the other, the gift will be void for uncertainty. *Thomas v. Thomas*, 6 T. R. 671; *Drake v. Drake*, 8 H. L. 172. See *Cope v. Henshaw*, 35 B. 420.

In such cases the rule that the name is to prevail against an error of demonstration can only apply if it is clear that the error is in the demonstration. And therefore either the name or the description will prevail, according as it is reasonably certain that the mistake is more likely to be made in the name than in the description, or *vice versâ*.

Gift to A.,  
second son of  
B., where A.  
is the third  
son of B.

If the gift is to A. B., second son of C. D., and A. B. is the third son, and there is nothing either in the will or in the relations of the second and third sons to the testator to point out one more than the other, the name will prevail. *Doe d. Chevalier v. Huthwaite*, 8 Taunt. 306; 2 Moo. 304; see 3 B. & Ald. 632; *Pryce v. Newbolt*, 14 Sim. 354; *Garland v. Beverley*, 9 Ch. D. 213; *In re Lyon's Trusts*, 48 L. J. Ch. 245; see, too, *Farrer v. St. Catherine's Coll.*, 16 Eq. 19.

But it may appear from the will or the relations of the second and third son to the testator, or from the fact that one of the sons was otherwise provided for, whether the name or

description was erroneous. Thus, if one of the two was godson or well known to the testator, the other not, the former takes. *Bernasconi v. Atkinson*, 10 Ha. 345; *Gregory's Will*, 34 B. 601; *Hodgson v. Clarke*, 1 D. F. & J. 394. Chap. XXII.

So if the testator, after a limitation to A. B., the second son of C., limits remainders to the third and fourth sons and so on, the argument is strong that the description and not the name was to prevail. *Bradshaw v. Bradshaw*, 2 Y. & C. Ex. 72; *Neeld v. Neeld*, W. N. 1878, 219.

But this argument was held not to apply where the limitations were to R. G. fourth son of G. G. in fee in case he should attain twenty-one, but if he should die under that age to the fifth son in fee, and so on; and accordingly R. H. G., the third son, took. *Gillett v. Gane*, 10 Eq. 29.

If, on the other hand, the description is such as to particularise a certain person, and to leave no doubt as to which of two persons was meant, the description will prevail. *Smith v. Coney*, 6 Ves. 42; *Lee v. Pain*, 4 Ha. 253; *Adams v. Jones*, 9 Ha. 485; *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364. Where the description is careful and elaborate it prevails.

And though there may be a person answering to the name, if there are in the will expressions which show that he could not have been meant, the case falls under the same head, and it becomes a question whether the name or the description is to prevail. *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364.

If the description is such as itself to supply a motive for the gift, the description will prevail. *Nunn's Trusts*, 19 Eq. 331; see *Re Fry*, 22 W. R. 679, 813; *Re Blayney's Trust*, I. R. 9 Eq. 413. Where the description supplies a motive for the gift.

## B. GIFTS TO PERSONS FILLING A CERTAIN CHARACTER.

The mere fact that a gift is made to a named legatee in a certain character, as for instance to my wife A., does not avoid the legacy if the legatee does not happen to fill the character. Gift to a legatee in a certain character.  
*Schloss v. Stiebel*, 6 Sim. 1; *Giles v. Giles*, 1 Keen, 685; *Re Pitt's Will*, 27 B. 576; *In re Boddington*; *Boddington v. Clairat*, 22 Ch. D. 597; 25 Ch. D. 685.

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Where the testator was separated from his wife, and had gone through the ceremony of marriage with another woman, the latter took under a residuary gift "to my wife." *In bonis Howe*, 33 W. R. 48.

If the legatee fraudulently assumed the character of wife for the purpose of deceiving the testator, and procuring a legacy, the question of fraud must be raised in the Court of Probate. A Court of Construction has no jurisdiction to go into the question of fraud where the will has once been proved. *Meluish v. Milton*, 3 Ch. D. 27, overruling *Kennell v. Abbott*, 4 Ves. 802; *Wilkinson v. Joughin*, L. R. 2 Eq. 319; see *Rishton v. Cobb*, 5 M. & Cr. 145; *In re Boddington*; *Boddington v. Clairat*, 25 Ch. D. 685; and see *ante*, pp. 21, 65.

**Servants.**

Upon the question whether, under a gift of a legacy to each of the testator's servants, servants who are in the testator's service at the date of the will, but quit it before his decease, are entitled to the legacy, there are two cases apparently directly opposed. Probably the later authority, in which they were held entitled to the legacy, would be followed. *Jones v. Henley*, 2 Ch. Rep. 162; *Parker v. Marchant*, 1 Y. & C. C. 290.

The word servants is not necessarily confined to servants living in the house. It has been held to include a farm-bailiff, a gardener and under-gardener, and a house-steward. *Bulling v. Ellice*, 9 Jur. 936; *Thrupp v. Collett*, 26 B. 147; *Armstrong v. Clavering*, 27 B. 226.

Such persons as stewards of Courts, a coachman provided by a job master, or a boy occasionally employed, are not included under the term servants. *Townshend v. Windham*, 2 Vern. 546; *Chilcott v. Bromley*, 12 Ves. 114; *Thrupp v. Collett*, 26 B. 147.

**Domestic servants.**

The term domestic servants would it seems exclude out-door servants. *Ogle v. Morgan*, 1 D. M. & G. 359.

**Gift of a year's wages.**

If the gift is of a year's wages it will be limited to servants hired by the year. *Booth v. Dean*, 1 M. & K. 560; *Blackwell v. Pennant*, 9 H. 551; *Breslin v. Waldron*, 4 Ir. Ch. 334.

A bequest to the two servants who shall be living with me at my death, has been held to go to all living with the testator at his death, though there may have been only two at the date of the will. *Sleech v. Torrington*, 2 Ves. sen. 560.

Under a bequest to servants "living with me at my decease," Chap. XXII.  
servants who have been wrongfully discharged before the testator's death, or voluntarily leaving the service, or dismissed on account of the testator's lunacy, are not entitled to anything. *Durlow v. Edwards*, 1 H. & C. 547; *Re Serres' Estate*; *Venes v. Marriott*, 10 W. R. 751; 31 L. J. Ch. 519; *In re Hartley's Trusts*, 26 W. R. 590; see *In re Benyon*; *Benyon v. Grieves*, 32 W. R. 871.

But a servant who at the testator's death has temporarily left his house and is to return to service is entitled to the legacy. *Herbert v. Reid*, 16 Ves. 481.

In wills under the Wills Act a gift to the testator's wife Gift to the  
testator's  
wife. must mean the person calling herself his wife at the date of the will, as a second marriage operates as a revocation of the will, and therefore a deceased wife's sister may take under the description of the testator's wife. *Pratt v. Matthew*, 22 B. 328; *Pitt's Will*, 27 B. 576; 5 Jur. N. S. 1235.

But *prima facie* wife means lawful wife. *Davenport's Trusts*, 1 Sm. & G. 126.

A gift to "my wife A." is effectual though the wife may after the date of the will have procured a divorce on the ground of nullity. *In re Boddington*; *Boddington v. Clairat*, 22 Ch. D. 597; 25 Ch. D. 685.

But in the same case a gift to the wife "so long as she shall continue my widow" was held not to take effect, as the legatee never having been the testator's wife could not continue his widow.

*Prima facie* a gift to the wife of A. who has a wife living Gift to the  
wife of a  
third person. at the date of the will goes to that wife and no other. *Boreham v. Bignall*, 8 Ha. 131; *Burrow's Trusts*, 10 L. T. N. S. 184.

At any rate this is the case if there is anything to show that the testator referred to a person known to him, by adding, for instance, the epithet "beloved." *Niblock v. Garrett*, 1 R. & M. 629.

And when a daughter has been described as wife of A., a subsequent gift to her husband means that husband only. *Bryan's Trust*, 2 Sim. N. S. 103; *Franks v. Brooker*, 27 B. 635.

But a gift, after a life interest to a son, amongst the wife of

**Chap. XXII.** the son (in case she should survive him) and all and every the children of the son, has been held to include a second wife, though there was a wife living at the date of the will, as it would include children by a second marriage. *In re Lyne's Trust*, 8 Eq. 65; but see *Firth v. Fielden*, 22 W. R. 622.

And a direction that in case of the bankruptcy of any of the legatees for life, their shares should be applied for the benefit of the wife and children of such legatees during the remainder of the life of the legatee, will include a second wife of one of the legatees who was married at the date of the will; the direction being applicable to several legatees, some of whom were not married, showing that no particular wife was intended. *Longworth v. Bellamy*, 40 L. J. Ch. 513.

But a similar direction as to the share of one legatee who was married at the date of the will will not include a second wife. *Boreham v. Bignall*, 8 Ha. 131.

**Husband.** Under a gift to any husband, with whom the testator's daughter might intermarry, a husband who had obtained a divorce was held entitled. *Bullmore v. Wynter*, 22 Ch. D. 619.

**Gift to the wife of a person who is unmarried.** If there is no person answering the description at the date of the will or the death, the gift vests indefeasibly in the first person who answers the description. *Radford v. Willis*, 12 Eq. 105; 7 Ch. 7; see *Peppin v. Beckford*, 3 Ves. 570.

As to the effect of a divorce upon a gift to a husband and wife during their joint lives, see *Knox v. Wells*, 2 H. & M. 674.

**Gifts to husband and wife and a third person.** It is not settled what the effect is of a gift to a husband and wife and a third person by a will made since the Married Women's Property Act, 1882. Possibly the Act would be held not to affect the question. *In re March; Mander v. Harris*, 24 Ch. D. 222; reversed 27 Ch. D. 166.

The Act does not affect the construction of such a gift by a will made before, though not taking effect till after the Act. *In re March; Mander v. Harris, supra.*

In cases not affected by the Act, the rules are as follows:—

"If an estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law in their right but the moiety." *Littleton*, sec. 291. The same

rule applies to personalty, and it makes no difference whether the bequest is a joint tenancy or a tenancy in common. Chap. XXII.

Thus a bequest to A. and B. his wife and C. as tenants in common goes in moieties to A. and his wife and to C. *Wylde's Estate*, 2 D. M. & G. 724.

A bequest to A. and B. his wife and C. during their lives and the life of the survivor of them, and after the death of the survivor over, would be enough to show that the wife was to take a separate interest. *Marchant v. Cragg*, 31 B. 398.

If the bequest is to A., B. and C. and the wife of C. equally, the second "and" is looked upon as a *subcopula*, and the property goes in thirds. *Bricker v. Whatley*, 1 Vern. 232.

So, too, if the gift is to A., his wife and children, the husband and wife take one share. *Gordon v. Whieldon*, 11 B. 170; *Atcheson v. Atcheson*, *ib.* 485.

But a very slight evidence of intention that the wife is to take a separate share has been held sufficient to prevent the rule; thus, if the words are to A., B., C., and his wife as tenants in common, husband and wife take several shares. *Warrington v. Warrington*, 2 Ha. 54, where the husband and wife were equally of kin to the testatrix; see, too, *Payne v. Wagner*, 12 Sim. 184.

And apparently if the words are to my son-in-law B. and my daughter P. his wife, their executors, administrators, and assigns, both take equally—the gift not being to husband and wife, but to son-in-law and daughter. *A.-G. v. Bacchus*, 9 Pr. 30; 11 Pr. 547.

Possibly the rule of the unity of husband and wife would not be applied to a husband and wife living under a foreign law, which recognises the separate existence of the wife. *Dias v. De Livera*, 5 App. C. 123.

Whether a gift to unmarried children is a *designatio personarum* or not depends on the language of the will. Thus, a gift to the son and unmarried daughters of A. goes to the daughters unmarried at the date of the will, the gift to the son showing that particular persons are meant. *Hall v. Robertson*, 4 D. M. & G. 781; see *Elliott v. Elliott*, 11 Ir. Ch. 482.

Meaning of the word unmarried in a direct gift.

Where the gift designates a class ascertainable at the testator's

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death, the subsequent marriage of one of the class will not avoid the gift. *Jubber v. Jubber*, 9 Sim. 503; see *Blagrove v. Coore*, 27 B. 138.

The primary meaning of unmarried in a direct gift is never having been married. *Thistlethwayte's Trusts*, 1 Jur. N. S. 881; 24 L. J. Ch. 713; *Dalrymple v. Hall*, 16 Ch. D. 715; *In re Sergeant*; *Mertens v. Walley*, 26 Ch. D. 575.

Under a gift to A. B., if she be sole and unmarried, the legatee whose marriage had been dissolved by the Divorce Court was held entitled. *In re Lesingham's Trusts*, 24 Ch. D. 703.

And under a gift after the death of the husband to the wife so long as she continues unmarried, the wife is entitled though she has been divorced. *Knox v. Wells*, 31 W. R. 559; 48 L. T. 655.

Gift to "a son."

A gift to "a son" of a person will, it seems, go to the son living at the date of the gift, if there is one. *Powell v. Davies*, 1 B. 532.

If there is no son living it goes to the first son born afterwards, if he survives the testator. *Powell v. Davies*, 1 B. 532; *Ashburner v. Wilson*, 17 Sim. 204; see, too, *Russell v. Russell*, 12 Ir. Ch. 377.

Gift to one of a class is void.

A gift to one of a class, as to one of the sons of a person, is void, though only one member of the class may happen to be living at the death of the testator. *Strode v. Russell*, 2 Vern. 621, 624; *In bonis Baylis*, 1 Sw. & T. 613; *In bonis Blackwell*, 2 P. D. 72; see *Beauchant v. Usticke*, W. N. 1880, 14.

Gifts to a first or second son.

The natural meaning of first or second son is first or second in order of birth.

1. No difficulty arises where all the sons born are living at the testator's death, or where no sons have then been born. In the latter case, the first or second son born afterwards will take. See *Driver v. Frank*, 3 Mau. & S. 25; 8 Taunt. 468; *Alexander v. Alexander*, 16 C. B. 59; *Bennet v. Bennet*, 2 Dr. & Sm. 266.

The second born son will take as second son, though his elder brother may die before he is born. *Trafford v. Ashton*, 2 Vern. 660.

2. If there is a first son at the date of the will it seems probable

that he would take as *persona designata*. *Saunders v. Richardson*, 18 Jur. 714; see *Re Harris*, 2 W. R. 689. Chap. XXII.

So, too, if there were a first and second son living at the date of the will the second son would probably take under the description second son. Whether the second son at the date of the will whose elder brother had died would take as second son, *quære*.

3. If a first or second son is dead at the date of the will the term will mean first or second son at the testator's death. *King v. Bennett*, 4 M. & W. 36; *Thompson v. Thompson*, 1 Coll. 388, —where the provisions of the will were confirmed by a codicil after the death of the first born son.

4. If a first or second son is born after the date of the will and dies in the testator's lifetime, a first or second surviving son will take. *Lomax v. Holmdon*, 1 Ves. sen. 290.

But this is not the case if the testator contemplates the possibility of lapse and provides for it; for instance, by a gift to the seventh or youngest child of a person who at the date of the will had six children. *West v. Lord Primate of Ireland*, 2 Cox, 258; 3 B. C. C. 148.

The terms elder and younger in wills must *primâ facie* be considered as used in their strict sense as applicable to age, and not in the figurative sense of anterior and posterior in order of limitation of estates. *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. Ex. 78; 2 H. L. 167; *Lyddon v. Ellison*, 19 B. 565; *Livesey v. Livesey*, 2 H. L. 419; *Longfield v. Bantry*, 15 L. R. Ir. 101. Meaning of the terms elder and younger.

In the case of limitations of real estate devised for life with remainders in tail, the natural meaning of eldest son is first born son. *Bathurst v. Errington*, 2 App. C. 698, 709.

Therefore, under a devise to the eldest son of A. for life with remainder to his first and other sons successively in tail, with remainder to the second and other sons of A. successively in tail, if the first born son of A. dies in the testator's lifetime without issue, A.'s second son takes an estate tail. *Meredith v. Treffry*, 12 Ch. D. 170.

The term eldest son may mean only son, as youngest child may mean only child. *Tuite v. Bermingham*, L. R. 7 H. L. 634; *Emery v. England*, 3 Ves. 232.

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If the testator contemplates a younger son as becoming eldest, or if the eldest were dead at the date of the will, eldest son can, of course, not mean first born son. *Hervey-Bathurst v. Stanley*, 4 Ch. D. 251; S. C. sub. nom. *Bathurst v. Errington*, 2 App. C. 698.

A clause shifting estates in the event of a younger son becoming the eldest son of his father applies only to a son becoming the eldest in his father's lifetime. *Bathurst v. Errington*, 2 App. C. 698.

Next surviving son.

When a testator has made disposition in favour of his sons, arranging them in a descending order of birth with a gift over of their respective shares in certain events to "my next surviving son," the next younger son takes under this description. *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

In the case of a bequest of personalty, whether immediate or in remainder, to the eldest child of a person, the eldest child living at the testator's death will take, though he may not have been the eldest at the date of the will. *Re Harris' Trust*, 2 W. R. 689.

The class of younger children is to be ascertained at the period of vesting.

With regard to the period at which the class of younger children is to be ascertained—

If there is an immediate gift to younger children the class will be ascertained at the testator's death, and a child who after that time becomes eldest will not be excluded. *Coleman v. Seymour*, 1 Ves. sen. 209; *Umbers v. Jaggard*, 9 Eq. 201.

Similarly, if the gift is to younger children who attain twenty-one, a child who is a younger child when it attains twenty-one will take, though it may afterwards become eldest. *Adams v. Roberts*, 25 B. 658. The decision in *Matthews v. Paul*, 3 Sw. 328, may be supported on the ground that the son excluded was the eldest at the time of vesting as well as at the time of distribution. See *Domville v. Winnington*, 26 Ch. D. 382.

In the same way an eldest son to be excluded will be ascertained at the time of vesting and not at the time of distribution. *Sandeman v. Mackenzie*, 1 J. & H. 613; *Adams v. Bush*, 8 Sc. 405; 6 Bing. N. C. 164; *Theed's Settlement*, 3 K. & J. 375; *Adams v. Adams*, 25 B. 642; *Domville v. Winnington*, 26 Ch. D. 382.

The testator may, however, show that the persons filling the character of eldest or youngest children were to be ascertained at the time of distribution by contemplating, for instance, the possibility that several persons successively might become eldest sons after the time of vesting. *Bowles v. Bowles*, 10 Ves. 177; *Livesey v. Livesey*, 2 H. L. 419; *Madden v. Ikin*, 2 Dr. & S. 207.

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Contrary intention.

Where the gift is to younger children upon some contingency, the cases are conflicting.

Gift to a class of younger children upon a contingency.

If there are no children surviving when the contingency happens the gift goes to the representatives of those who died in the lifetime of an elder brother. *Lady Lincoln v. Pelham*, 10 Ves. 166.

If there are children living when the contingency happens *Ellison v. Airey*, 1 Ves. sen. 111, and *Hall v. Hewer*, Amb. 204, are direct authorities for saying that the eldest child is to be then ascertained, and not before. See, too, *Stevens v. Pile*, 30 B. 284.

But now it would probably be held that the class ought to be ascertained at the time when the interests become transmissible, and it was so decided in *Bryan v. Collins*, 16 B. 14. See, too, *Sanders' Trust*, L. R. 1 Eq. 675.

The exclusion from a class of a child "entitled" to certain property means *prima facie* entitled in possession. *Chorley v. Loveland*, 33 B. 189; 12 W. R. 187; *Umbers v. Jaggard*, 9 Eq. 201.

Meaning of "entitled."

See further as to the construction of similar clauses of exclusion, *Wyndham v. Fane*, 11 Ha. 287; *Johnson v. Foulds*, 5 Eq. 268; *Re Gryll's Trust*, 6 Eq. 589.

When the testator has placed himself *in loco parentis*, and shows an intention to provide portions for younger children, the rule established with regard to marriage settlements, that elder son means a son taking the bulk of the estate, and younger son a son unprovided for, applies to wills, as well in the case of personalty as of realty. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

In what cases eldest son means a son taking the bulk of the estates.

In such cases the rule is that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of

**Chap. XXII.** the estate by virtue of the limitations in strict settlement, shall take any benefit from the portions. *Macoubrey v. Jones*, 2 K. & J. 684, 690.

Even in marriage settlements, however, this construction will not be adopted, unless it appears upon the face of the instrument that the exclusion had reference to the fact of the person to be excluded taking other property. *Re Theed's Settlement*, 3 K. & J. 375; *Hervey-Bathurst v. Stanley*, 4 Ch. D. 251, 262; see *Domville v. Winnington*, 26 Ch. D. 382.

The time for ascertaining who fills the character of eldest son is the period for distributing the portions, but he need not then be entitled to the settled estate if he has substantially had the benefit of it. *Collingwood v. Stanhope*, L. R. 4 H. L. 43.

Younger son may mean son not taking the family estate.

And a younger son who at that time has become the eldest, and takes the estate will be excluded from a portion, though the portion may have already vested in him. *Gray v. Earl of Limerick*, 2 De. G. & S. 370; *Richards v. Richards*, Johns. 754; *Davies v. Huguenin*, 1 H. & M. 730; *Swinburne v. Swinburne*, 17 W. R. 47; see *Leake v. Leake*, 10 Ves. 476.

If, however, the eldest son is excluded not as eldest son, but by name, the rule does not apply. *Wood v. Wood*, 4 Eq. 48.

In what cases the eldest son is to be ascertained at the period of vesting.

There may, however, be circumstances showing that the eldest son is to be ascertained at some other time than the period of distribution; for instance, at the time of vesting.

A mere gift over to take effect on a younger son becoming an eldest before attaining twenty-one will not alter the rule. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

But if there is a clear intention that the portions are to vest indefeasibly before the time of distribution, the eldest son is ascertained at the time of vesting. *Windham v. Graham*, 1 Russ. 331; see *Ex parte Smyth*, 12 Ir. Ch. 487; *Re Rivers' Settlement*, 40 L. J. Ch. 87.

Under what title a son must take the family estates in order to be excluded from a portion.

The further question arises in what manner the younger child must be entitled to the estate in order to be excluded from a portion.

The fact that the estate has been sold for a sum not sufficient to satisfy the portions does not entitle the eldest son to a portion. *Reid v. Hoare*, 26 Ch. D. 363.

A second son, becoming an eldest son, but prevented from taking the estate by a recovery suffered in the lifetime of his brother, is entitled to share in portions provided by the settlement for younger children. *Tennison v. Moore*, 13 Ir. Eq. 424; *Spencer v. Spencer*, 8 Sim. 87; *Macoubrey v. Jones*, 2 K. & J. 684; *Adams v. Beck*, 25 B. 648, overruling *Peacocke v. Pares*, 2 Kee. 689. Chap. XXII.

So, too, a younger son succeeding to the reversion of the settled estates, not under the settlement creating the portions, but by descent or by devise, is not within the rule, and does not lose his right to a portion. *Sing v. Leslie*, 2 H. & M. 68; *Adams v. Beck*, 25 B. 648.

On the other hand, as a younger child becoming elder is excluded from taking a portion, so an elder child not taking the estate is admitted to a portion. *Duke v. Doidge*, 2 Ves. sen. 203. An elder son not taking the estate may be entitled to a portion.

And if he dies before the period of distribution his representatives are entitled, whether the exclusion is of the eldest son for the time being or not. *Ellison v. Thomas*, 2 Dr. & Sm. 111; 1 D. J. & S. 18; *Davies v. Huguenin*, 1 H. & M. 730; *Swinburne v. Swinburne*, 17 W. R. 47.

An elder son has been included under the expression second and other sons, in cases where the probability was that the elder had been left out by mistake. *Langston v. Langston*, 8 Bl. N. S. 16; 2 Cl. & F. 194; *Blake's Estate*, 19 W. R. 765; *Tavernor v. Grindley*, 32 L. T. N. S. 424; *Grattan v. Langdale*, 11 L. R. Ir. 473. Gift to second and other sons has in some cases included a first son already.

But this construction will not be adopted when there are sufficient reasons for the exclusion of the elder son. *Bermingham v. Twite*, 1 R. 7 Eq. 221; L. R. 7 H. L. 634.

## CHAPTER XXIII.

## CONSTRUCTION OF GIFTS TO CHILDREN.

## A. ILLEGITIMATE CHILDREN.

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Children  
means legiti-  
mate children.

I. "THE description child, son, issue, every word of that species, must be taken *prima facie* to mean legitimate child, son, or issue:" *per* Lord Eldon, *Wilkinson v. Adam*, 1 V. & B. 422. And it may be stated as a general rule that where there is a bequest to children without anything on the face of the will to show that the testator meant by children illegitimate children, and there is a possibility at the date of the will of legitimate children to satisfy the terms of the bequest, evidence *dehors* the will is not admitted to prove that the testator may or must have meant illegitimate children. *Durrant v. Friend*, 5 De G. & S. 343; *Re Davenport's Trusts*, 1 Sm. & G. 126; *Re Overhill's Trusts*, 1 Sm. & G. 362; *Medworth v. Pope*, 27 Beav. 71; *Warner v. Warner*, 15 Jur. 141; 20 L. J. Ch. 273; and see *Gabb v. Prendergast*, 1 K. & J. 439; *Godfrey v. Davis*, 6 Ves. 43; *Kenebel v. Scrafton*, 2 East. 530; *Harris v. Lloyd*, T. & R. 310; *Mortimer v. West*, 3 Russ. 370; *Bagley v. Mollard*, 1 R. & M. 581; *Swaine v. Kennerley*, 1 V. & B. 469; *Meredith v. Farr*, 2 Y. & C. C. 525; *Re Bolton*; *Brown v. Bolton*, 53 L. T. 25.

The same rule applies where the words next of kin are used. *Re Standley's Estate*, L. R. 2 Eq. 303.

In the will of a Jew domiciled in England, children must mean legitimate children according to English and not according to Jewish law. *Levy v. Solomon*, 25 W. R. 842.

In the case of real estate the question of legitimacy must

be determined according to English law. *Doe v. Vardill*, 7 Cl. Chap. XXIII. & F. 895; 6 Bing. N. C. 385; 9 Bl. N. S. 32.

In the case of a gift of personalty to the children of a person having a foreign domicile, the children need not be legitimate according to English law, if they are legitimate according to the law of their parent's domicile at the time of their birth. *In re Goodman's Trusts*, 14 Ch. D. 619; 17 Ch. D. 266, overruling so far as *contra In re Wright's Trusts*, 2 K. & J. 595; *Boyes v. Bedale*, 1 H. & M. 798. See *In re Wilson's Trusts*, L. R. 1 Eq. 247; *ib.* 3 H. L. 55; *Atkinson v. Anderson*, 21 Ch. D. 100.

In the same way children born before the marriage of their parents in a country where a subsequent marriage legitimates the children, are to be treated as legitimate. *In re Andros*; *Andros v. Andros*, 24 Ch. D. 637.

In the absence of direct evidence of the marriage of the parents of the children, it may be proved by reputation. *Lyle v. Ellwood*, 19 Eq. 98; *Collins v. Bishop*, 48 L. J. Ch. 31.

As to proof of legitimacy, see *Hawes v. Draeger*, 23 Ch. D. 173.

II. But under the description of child, son, issue, and similar words, illegitimate children if they have acquired the reputation of being children of the person in question may take in the following cases:

*In what cases illegitimate children may take.*

1. If looking at the circumstances existing at the date of the will there is no possibility of legitimate children to satisfy the terms of the bequest.

*When there is no possibility of legitimate children.*

(a.) If, for instance, the bequest is to the children of A. now living, and A. has only illegitimate children, they would take. *Dover v. Alexander*, 2 Hare, 282, per Wigram, V.-C.

(b.) So if it appears from the language of the will that children living at the date of the will are meant, and there are only illegitimate children then living, they will take.

Thus in *Holt v. Sindrey*, 7 Eq. 170, there was a bequest to the testator's "daughter Mary, the wife of John Lattimer," and after her death "unto all and every the child or children of his said daughter begotten or to be begotten." It appeared that Mary was not the lawful wife of John Lattimer, and that the

Chap. XXIII. testator was not aware of this fact. Stuart, V.-C., held that illegitimate children born at the date of the will were sufficiently described by the words "children begotten." See, too, *In re Dixon*, 2 Jur. N. S. 970; *Gabb v. Prendergast*, 1 K. & J. 439.

And in *Savage v. Robertson*, 7 Eq. 176, a bequest to "my sister, Mary Robertson, and her two youngest daughters," Mary Robertson being a spinster, was held a sufficient designation of her two youngest illegitimate daughters. See *Hartley v. Tribber*, 16 B. 510; *Laker v. Hordern*, 1 Ch. D. 644.

A direction, however, to divide property into shares corresponding in number with the number of legitimate and illegitimate children of a person at the date of the will, is not in itself a sufficient indication that illegitimate children then living are meant to be included, since, if before the testator's death one or more of the children had died, the division prescribed by the will would have been inapplicable. *Cartwright v. Vaudry*, 5 Ves. 530; *In re Wells' Estate*, 6 Eq. 599.

(c.) If the gift is to the children of a deceased person who had only illegitimate children, the illegitimate children take. *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419; *Edmunds v. Fessey*, 29 Beav. 233.

(d.) If the gift is to the children in the plural of a deceased person who had only one legitimate child and one or more illegitimate children, they will all take in order to satisfy the plural number. *Gill v. Shelley*, 2 R. & M. 336; *Leigh v. Byron*, 1 Sm. & G. 486; but see *Hart v. Durand*, 3 Anstr. 684.

If, however, it does not appear on the face of the will that the person to whose children the bequest is given was dead at the date of the will, and the testator was not a near relation, it will not be presumed that he knew of the death, but evidence will be admitted to show that he was aware of it. See *Herbert's Trusts*, 1 J. & H. 121; *Milne v. Wood*, 42 L. J. Ch. 545.

(e.) The description "children" will also be taken to mean illegitimate children when the gift is to the children of two persons who cannot by any possibility have legitimate children between them. *Bayley v. Snelham*, 1 S. & St. 78.

(f.) And it seems that a bequest by an unmarried man or

woman to his or her children must mean illegitimate children, because every will since the Wills Act made by a man or woman is revoked by his or her marriage (see sec. 18), and, therefore, none but illegitimate children could by any possibility take under it. *Pratt v. Matthew*, 22 Beav. 328; *Clifton v. Goodbun*, 6 Eq. 278; see *In re Bolton*; *Bolton v. Bolton*, W. N. 1885, 128. Chap. XXIII.

But under a gift to the children of a living person, when there is no evidence on the face of the will to show that illegitimate children are intended, legitimate children alone will take. And this will be the case— Circumstances insufficient to admit illegitimate children.

Though the person whose children are to be benefited has, at the date of the will, only illegitimate children, and at the testator's death there is no possibility of any others. *Godfrey v. Davis*, 6 Ves. 43; *Re Davenport's Trusts*, 1 Sm. & G. 126; *Kelly v. Hammond*, 26 B. 36; *Dorin v. Dorin*, L. R. 7 H. L. 568.

It will also be the case, though the person to whose children a gift is bequeathed has, at the date of the will, only illegitimate children, and is, whether from old age or other causes, never likely to have any others. *Re Overhill's Trust*, 1 Sm. & G. 362; *Paul v. Children*, 12 Eq. 16.

There are, however, two cases in which this rule has not been followed. *Fraser v. Piggott*, You. 354, before Lord Lyndhurst; and *Beachcroft v. Beachcroft*, before Sir Thomas Plumer, M. R., 1 Mad. 430. In the former, after a bequest to the testator's grandchildren, being children of his sons, whether born in wedlock or not, there was a gift of residue to his two sons, and if either died his moiety to go to his children equally. Both sons died in the testator's lifetime. One had only illegitimate children, the other legitimate and illegitimate children. Lord Lyndhurst held that the illegitimate children of the son, who had no others, and the legitimate children alone of the other son were entitled. Lord Lyndhurst lays down, "If there be no legitimate children, then extrinsic evidence may be given of the persons who were intended." *Fraser v. Piggott, Beachcroft v. Beachcroft* discussed.

The same would seem to follow from the decision of Sir Thomas Plumer in *Beachcroft v. Beachcroft*, which was the case of a bequest by an unmarried man to "my children." See, too, *Laker v. Hordern*, 1 Ch. D. 644.

Chap. XXIII. These cases have, however, been repeatedly questioned. See *James v. Smith*, 14 Sim. 216; *Re Overhill's Trusts*, 1 Sm. & G. 362; *Holt v. Sindrey*, 7 Eq. 170. And so far as they go to establish a rule that a gift by will to the children of a living person, who at the date of the will has only illegitimate children, and never has any others, is good as regards the illegitimate children, they cannot be held to be law. It may, however, be noticed that the decision in *Beachcroft v. Beachcroft* may be upheld on grounds independent of any such rule. The Master of the Rolls seems to adopt the principle that children means present children: "It is unreasonable to suppose that a man sitting down to make his will and intending bounty to the children of a certain individual, should not have in his mind some present person to fill that character;" but afterwards he lays stress upon the words "mother of my children," as indicating that the testator meant illegitimate children, for, he asks, "Did anybody ever describe his wife by the term mother of my children?" 1 Mad. p. 444; and finally he says, "I think *ex visceribus* of the will, the legatees whom this testator must have intended to describe were not the possible progeny of after marriage but existing persons, children already born." So that the case would rather seem to be one in which the testator has on the face of his will shown that he meant illegitimate children to take. See *per* Stuart, V.-C., *Re Overhill's Trusts*, 1 Sm. & G. 362.

The testator  
may show  
that he meant  
illegitimate  
children.

2. Illegitimate children existing at the date of the will, including a child then *en ventre*, may take under the term children if they are sufficiently indicated, that is to say, where "taking the will as the dictionary of the meaning of the terms used in it," it appears that the testator meant illegitimate children. *Wilkinson v. Adam*, 1 V. & B. 422, p. 462; *Hill v. Crook*, L. R. 6 H. L. 265. "The intention need not be expressed in language which is necessarily susceptible of only one interpretation, but it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator." *Hill v. Crook*, L. R. 6 H. L. 277, *per* Lord Chelmsford.

(a.) Thus natural children, born at the date of the will, of

course take where the gift is to natural children in express terms. *Metham v. Duke of Devonshire*, 1 P. Wms. 529; *Barnett v. Tugwell*, 31 B. 232; *Evans v. Massey*, 8 Price, 22; *Bentley v. Blizard*, 4 Jur. N. S. 652. Chap. XXIII.

(b.) So if after a gift to the children of A., the testator in a subsequent gift defines whom he means, by adding "namely," and inserting their names. *Meredith v. Farr*, 2 Y. & C. C. 525.

(c.) If there is a gift to the children of the testator by a particular woman, when it appears on the face of the will that he has a wife living, or to "my wife A. for life, and after her death to my children," where the testator is not married to A., but has a wife living from whom he is separated, his children by A. will take. *Wilkinson v. Adam*, 1 V. & B. 422; *Lepine v. Bean*, 10 Eq. 160. See *Bayley v. Snelham*, 1 S. & St. 78.

(d.) A convenient rule of construction might very fairly have been deduced from the judgments of the House of Lords, in *Hill v. Crook*, L. R. 6 H. L. 265, to the effect that where a testator describes A. as the wife of B. when he knows that A. is not in fact lawfully married to B., and by that description gives property to her for life with remainder to her children, the term children must be taken to include A.'s children by B. See *per* Earl Cairns, L. R. 6 H. L. p. 285. Gift to A.,  
wife of B.,  
and then to  
her children.

The Courts have, however, refused to adopt this rule, and as the cases stand, it appears to be necessary to make the following distinctions:—

A gift to "my daughter A. the wife of B.," and then for the "children of my said daughter," where A. and B. can by no possibility have legitimate children between them, will include the illegitimate children of A. by B. *Hill v. Crook*, L. R. 6 H. L. 265; *Perkins v. Goodwin*, W. N. 1877, 111.

But the same rule does not apply if A. and B., though unmarried at the date of the will, may marry and have legitimate children. *In re Ayles' Trusts*, 1 Ch. D. 282; *In re Yearwood's Trusts*, 5 Ch. D. 545; *Ellis v. Houston*, 10 Ch. D. 236. In the first of these cases it does not appear whether the testator knew that A. and B. were unmarried at the date of the will.

(e.) Under a gift to the children of the testator's daughter by her present putative husband or by any other person whom she

Chap. XXIII. might marry, though the daughter subsequently married her then putative husband, her illegitimate son by him took. *In re Brown's Trust*, 16 Eq. 239; *In re Connor*, 2 J. & Lat. 456; *Dilley v. Matthews*, 13 W. R. 676; 11 Jur. N. S. 425.

Illegitimate  
child called  
a child.

(f.) If the testator expressly includes an illegitimate child in the word children, for instance by a recital that the testator has certain children among whom he enumerates an illegitimate child, or the like, the illegitimate child will take under a subsequent gift to children. *Owen v. Bryant*, 2 D. M. & G. 697; *Worts v. Cubitt*, 19 B. 421; *Evans v. Davies*, 7 H. 498.

So, too, it would seem that if the testator describes an illegitimate nephew as his nephew, a subsequent gift to the children of his nephews would include the children of the illegitimate nephew. *Tugwell v. Scott*, 24 B. 141; *Allen v. Webster*, 6 Jur. N. S. 574.

The fact that an illegitimate child has been described as a child in a gift to him would probably not alone be sufficient to show that he was intended to be included in a subsequent gift to children. *In re Hindle*; *Megson v. Hindle*, 28 W. R. 866; 15 Ch. D. 198; see *Bagley v. Mollard*, 1 R. & M. 581; *In re Humphries*; *Smith v. Millidge*, 24 Ch. D. 691.

Whether  
legitimate and  
illegitimate  
children can  
take together  
under one  
description.

III. It has sometimes been laid down that legitimate and illegitimate children cannot together take under the same description or the same class. For instance, in *Bagley v. Mollard*, 1 R. & M. 581, the M. R. said, "Whenever the general description of children will include legitimate children it cannot also be extended to illegitimate children," p. 586. See, too, *per* Lord Romilly, M.R., in *Pratt v. Matthew*, 22 Beav. 328. "It is also clear that illegitimate children cannot take under a gift to children unless it be quite clear on the face of the gift that legitimate children never could have taken under the gift." As early an authority, however, as *Wilkinson v. Adam*, 1 V. & B. 422, seems to point the other way (see especially the opinion of the judges there stated), though the exact point was not decided, but there is no doubt now since the case of *Hill v. Crook*, L. R. 6 H. L. 265, that a gift to children, with a clear intention that it shall apply to existing illegitimate children, will be so

applied, although the gift must be extended to future legitimate children. Chap. XXIII.

IV. A bequest to future illegitimate children, born between the date of the will and the testator's death where they are sufficiently designated, is good as regards those children who have at the time of the testator's death acquired the reputation of being the children in question. Bequest to future illegitimate children.

Previously to the case of *Occleston v. Fullalove*, 9 Ch. 147, the general current of authority seems to have been in favour of the opinion that no gift, however express, to unborn illegitimate children would be allowed by law, and that under a gift, good as to illegitimate children as a class, no illegitimate children born after the date of the will would be permitted to take. (See *per* Lord Chelmsford in *Hill v. Crook*, L. R. 6 H. L. 278.) This opinion was frequently expressed incidentally by the Judges (see, for instance, *per* Lord St. Leonards *In re Connor*, 2 J. & Lat. 460; Lord Romilly, *Medworth v. Pope*, 27 Beav. 73; *Holt v. Sindrey*, 7 Eq. 176, and *per* Lords Chelmsford and Colonsay in *Hill v. Crook*, L. R. 6 H. L. 265); but the exact point does not appear to have been decided till *Howarth v. Mills*, L. R. 2 Eq. 391. In that case there was a bequest by a single woman, "to each and every of my children, legitimate or otherwise, who shall be living at the time of my decease," and Lord Hatherley held that illegitimate children born after the date of the will could not take. See also *Metham v. Duke of Devon*, 1 P. Wms. 529, and the remarks on that case by the L. J. James in *Occleston v. Fullalove*, L. R. 9 Ch. p. 167. The grounds of the opinion and the decision based upon it were that a gift to future illegitimate children is against public policy, as being an inducement to vice; but the decision of the Lords Justices of Appeal in *Occleston v. Fullalove*, 9 Ch. 147, has now settled that there is no rule of policy preventing gifts by will to future illegitimate children where it is sufficiently clear that they were intended to take, and *Howarth v. Mills* is therefore overruled.

It is a question of some interest whether the judgment of the Lords Justices in *Occleston v. Fullalove* would be upheld by the House of Lords, and considering the adverse judgment of Lord

Chap. XXIII. Selborne and the dicta of Lords Chelmsford and Colonsay in *Hill v. Crook*, not dissented from by Lord Cairns, to which must be added the decision of Lord Hatherley in *Howarth v. Mills*, there may be some doubt upon this point.

A gift to future illegitimate children is against public policy, it is said, because it encourages immoral connections and discourages marriage. It is, however, difficult to see how a gift by will which, till the death of the testator, is of no effect, whatever it may be morally, can legally be said to be a consideration or inducement to immorality. If a man were to make a settlement by deed upon himself for life, with remainder to such illegitimate children whom he might at the time of his death be reputed to have by a certain woman, as he should by will appoint, and in default of appointment over, with a general power of revocation, apparently no appointment as to after-born illegitimate children would be good, though the deed may not have been communicated to anyone: see *Dover v. Alexander*, 2 Ha. 275. And the distinction between such a deed and a gift to after-born illegitimate children by will is, no doubt, difficult to draw. But the distinction between cases on either side of a boundary line is necessarily subtle and technical. A deed speaks from its execution, a will is effectual only from the testator's death. A deed is a legal and formal document, requiring a formal execution of the power of revocation; a will is informal and can be revoked or modified in a manner equally informal. In the case of a deed, with a power of revocation, there is a *prima facie* presumption that it will not be revoked, as revocation would involve trouble and expense, which would not be incurred, or incurred in less measure, in the case of a will. Under these circumstances the distinction, though practically evanescent, may very well be upheld as a matter of legal convenience. At any rate, if the distinction between such a deed as before mentioned and a will is refined, the distinction which would make a bequest to an illegitimate child the day before it is conceived bad, and a similar bequest the day after it is conceived good, is on grounds of public policy equally refined. The inducement, if any, to immorality, when once the strictly legal conception of consideration is departed from, lies as much in the

capacity of benefiting illegitimate children by will at all, as of Chap. XXIII.  
benefiting future illegitimate children.

The decision in *Occleston v. Fullalove*, while deciding that future illegitimate children may take under a gift by will, if sufficiently described, leaves some doubts on the question of what description will suffice. The gift there was "to all other children which the testator might have or be reputed to have by M. L., then born or thereafter to be born," and the Lords Justices laid stress upon the word reputed, as obviating any difficulty which might arise if it were necessary to inquire into the fact of paternity—an inquiry which the law will not undertake. "A man makes a gift 'to my future children by A. B.:' there is a condition annexed to the gift that they shall be really his children; but that is a condition the existence or non-existence of which it is impossible to ascertain. His access or non-access, the access or non-access of any other person or persons, the more or less profligacy or immorality of the female, the signs of race or caste, or blood, might have all to be inquired into and brought into public discussion before it could be ascertained whether or not they were his children. The law forbids such inquiries, and, except in exoneration of parish rates, accepts no evidence of actual paternity but the marriage union," *per* Lord Justice James, *Occleston v. Fullalove*, p. 163; and "the cases appear to establish that a bequest to the future illegitimate children of a man is void for uncertainty, because the law will not allow evidence to be given that they are the actual children of the man," *per* Lord Justice Mellish, *ib.* 170. These remarks seem to imply that where future illegitimate children of a particular father are referred to they can only take under a form of words descriptive of the reputation and not the fact of paternity. But the distinction appears to be unimportant, and in *In re Goodwin's Trusts*, 17 Eq. 345, where there was a bequest by a woman to "all and every her children and child by Richard Perkins," the M. R. held that an after-born child, who at the time of the testator's death had acquired the reputation of being her child by Richard Perkins, was entitled.

This case, it may be noticed, also decides that words of futurity are not necessary to enable after-born illegitimate Words of futurity not necessary.

**Chap. XXIII** children to take unless a distinction could be drawn between "her children" and "all and every her children."

Illegitimate children born after the testator's death.

V. Illegitimate children born after the death of the testator, unless *en ventre* at that time, can in no case take under his will. Such a gift would, in fact, be the same as a gift by deed upon an immoral condition. *Crook v. Hill*, 24 W. R. 876; 3 Ch. D. 773.

Illegitimate child *en ventre* at the date of the will.

VI. With regard to an illegitimate child *en ventre sa mère* at the date of the will, such a child can take if it is sufficiently designated; thus, a bequest to the child with which a woman is at the time pregnant is a good bequest, as there can be no uncertainty. *Evans v. Massey*, 8 Pr. 22; *Gordon v. Gordon*, 1 Mer. 142.

And where a gift to the children of a woman applies to illegitimate children, an illegitimate child *en ventre* at the date of the will is admitted to share. *Hill v. Crook*, 3 Ch. D. 773.

Whether child *en ventre* can acquire a title by repute.

But if a child is described with reference to its father there seems to be considerable doubt whether the bequest is not void for uncertainty. To establish the fact of paternity would involve an inquiry which the law will not allow, and it is doubtful whether an illegitimate child can acquire a title by repute till it is born. See *Earle v. Wilson*, 17 Ves. 528.

In *Gordon v. Gordon* (sup. cit.), Lord Eldon says: "A bastard cannot take as the issue of a particular person until it has acquired the reputation of being the child of that person, which cannot be before its birth." (See, too, *Metham v. Duke of Devon*, 1 P. Wms. 529; *Blodwell v. Edwards*, Cro. El. 509; see 1 Co. Litt. 3 b.)

On the other hand, both Lord St. Leonards and Lord Romilly seem to have thought that an illegitimate child *en ventre* may have a name by reputation. "A child *en ventre sa mère* is a child *in esse*, and may have a name by reputation," *per* Lord St. Leonards in *In re Connor*, 2 J. & Lat. p. 460; and "It is undoubtedly true that a child *en ventre sa mère* may acquire a name by reputation although illegitimate," *per* Lord Romilly in *Pratt v. Matthew*, 22 B. 339. On practical grounds there seems to be no reason why an illegitimate child *en ventre sa mère* should not acquire a title by reputation, and looking at the

tendency of the more recent decisions, ending with *Occleston v. Fullalove*, the probability seems to be that the Courts would adopt the opinion of Lords St. Leonards and Romilly. Chap. XXIII.

VII. Where there is a bequest to future illegitimate children, but without a specific description which could apply to a child *en ventre* at the testator's death :

Whether child *en ventre* at the death will take under a gift to future illegitimate children.

If the gift is to the illegitimate children of a woman, a child *en ventre* at the time of the testator's death will be admitted to take. When the so-called rule of public policy against bequests to illegitimate children born between the date of the will and the testator's death is rejected, there is no reason why illegitimate children *en ventre* should be treated by the law with less favour than legitimate. *Hill v. Crook*, 3 Ch. D. 773.

Where the gift, however, is to future illegitimate children with a reference to the father, the same difficulty with regard to reputation arises as in the case previously mentioned. If, however, a bastard *en ventre* can acquire a title by repute, it seems it would take under the gift in question if the repute is acquired at the time of the testator's death, which appears to be the proper limit for fixing it. See *per* Lord Justice Mellish, L. R. 9 Ch. 171.

## B. LEGITIMATE CHILDREN.

1. *Children primâ facie* includes children by a first and second marriage. *Barrington v. Tristram*, 6 Ves. 345; *Critchett v. Taynton*, 1 R. & M. 541; *Andrews v. Andrews*, 15 L. R. Ir. 199. The term children includes children by a first and second marriage.

And even where there was an express reference to a present or any future husband, children by a former husband were not excluded. *Pasmore v. Huggins*, 21 B. 103; *Re Pickup's Will*, 1 J. & H. 389.

But there may be an intention to exclude the children of a first marriage. *Stavers v. Barnard*, 2 Y. & C. C. 539; *Lovejoy v. Carter*, 35 B. 149.

2. A gift to the children of a living person will not go to his grandchildren, though he may have only grandchildren living at the date of the will and the testator's death. *Moor v. Raibeck*, 12 Sim. 123. Children do not include grandchildren.

Chap. XXIII.

If, however, the gift is to the children of a person deceased, who had only grandchildren living at the time, the grandchildren will take, and they will take to the exclusion of great grandchildren. *Berry v. Berry*, 3 Giff. 134; 9 W. R. 889; *Fenn v. Death*, 23 B. 73.

But a gift to the children of a deceased person, who has only grandchildren living at the date of the will, will not go to the grandchildren if the will distinguishes between children and grandchildren. *Loring v. Thomas*, 3 Dr. & S. 497.

And a gift to the children of several persons deceased will not include the grandchildren of one who had no children at the date of the will if there are any children of the others to take. *Radcliffe v. Buckley*, 10 Ves. 195; *In re Kirk*; *Nicolson v. Kirk*, W. N. 1885, 7.

Gift to children to be born will not exclude those born already.

3. A gift to children hereafter to be born or that may be born will not, without more, exclude children already born. *Hibblethwait v. Cartwright*, Ca. tem. Talb. 31; *Wilkinson v. Adam*, 1 V. & B. 422, 464; *Harrison v. Harrison*, 1 R. 10 Eq. 290.

But where there are gifts to three out of four children living at the date of the will, a gift to each child that may be born applies only to after-born children. *Early v. Middleton*, 14 B. 453; 3 D. F. & J. 1.

Posthumous children.

And in the same way a testator may confine his bounty to posthumous children. *Doe d. Blakiston v. Haslewood*, 10 C. B. 544; see *White v. Barber*, 5 Burr. 2703; *Re Lindsay*, 3 Ir. Ch. 239.

After-born children, where excluded.

4. Words *primâ facie* referring to present children, such as "to children lawfully gotten," or "to every child he hath," will not exclude after-born children if they can fairly be construed as referring to the *stirps*. *Browne v. Groombridge*, 4 Mad. 495; *Ringrose v. Bramham*, 2 Cox, 384; see *Goodfellow v. Goodfellow*, 18 B. 356.

A gift to "children who survive me" will not exclude those born after the testator's death. *Re Clark's Estate*, 3 D. J. & S. 111.

Express gift to a child will not exclude him from a

5. An express gift to one child will not prevent his taking under a subsequent gift to children. *Reay v. Rawlins*, 29 B. 88; see *Hanna v. Bell*, 7 Ir. Ch. 208.

Nor will a gift to A. and her daughter for their lives exclude <sup>Chap. XXIII.</sup> the daughter from taking under a gift in remainder to the subsequent children of A. and her daughter. *Almack v. Horn*, 1 H. & M. 630. <sup>gift to children.</sup>

On the other hand, a gift to several children by name will not prevent other children from taking under a subsequent gift to children. *Moffatt v. Burnie*, 18 B. 211; see *Re Connor*, 8 Ir. Eq. 401.

A gift to children "from A. downwards" includes A. *Lett v. Osborne*, 47 L. T. 40.

6. When there is a gift to the members of a class for their lives, with remainder to their children, the death of a member of the class in the lifetime of the testator after the date of the will will not prevent his children from taking, but the children of members of the class dead at the date of the will will not take. *Habergham v. Ridehalgh*, 9 Eq. 395. <sup>Children of parents dead at the date of the will.</sup>

On the other hand, if the gift is to the testator's brothers and sisters for their lives, with remainder to their children, and the testator has only one brother living at the date of the will, children of deceased brothers and sisters will take. *Barnaby v. Tassell*, 11 Eq. 363.

7. Gifts to the children of A. and B.:—

a. It seems that the *prima facie* grammatical construction of a gift to the children of A. and B. is, that B. and the children of A. are entitled. *In re Featherstone's Trusts*, 22 Ch. D. 111. <sup>Gift to the children of A. and B.</sup>

b. If A. and B. are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take—as in a gift to the children of my brother A. and my brother B. *Mason v. Baker*, 2 K. & J. 567; see *Whicker v. Mitford*, 3 B. P. C. 442.

c. If they do not bear the same relation to the testator, and A. has children at the date of the will, while B. is unmarried, the gift goes to B. and the children of A. *Stummvoll v. Hales*, 34 B. 124.

d. So, too, if A. is described as deceased; for instance, if the gift be to the children of the late A. and B., B. and the children of A. will take. *Lugar v. Harman*, 1 Cox, 250; *Hawes v. Hawes*, 14 Ch. D. 614; but see *Re Davies' Will*, 29 B. 93.

Chap. XXIII. This is *a fortiori* the case where B. is referred to as a legatee. *Ingle's Trusts*, 11 Eq. 578.

e. A gift for "the benefit of the children of A. and of B." goes to the children of A. and of B. *Peacock v. Stockford*, 3 D. M. & G. 73.

Gift to a certain number of children when there are more.

8. If there is a gift to the six children of A. who has only six living at the date of the will, the legacy goes to them. *Sherer v. Bishop*, 4 B. C. C. 55.

And a seventh child *en ventre* at that time will not be admitted to a share. *Re Emery's Estate*, 24 W. R. 917.

But if the number does not correspond with the number living at the date of the will, all the children then living will take, whether the gift is of a lump sum or of a distinct sum to each, in which latter case each child will be entitled to a legacy of that sum. *Garvey v. Hibbert*, 19 Ves. 125; *Stebbing v. Walkey*, 2 B. C. C. 85; 1 Cox, 250; *Lee v. Pain*, 4 Ha. 249; *Harrison v. Harrison*, 1 R. & M. 72; *Morrison v. Martin*, 5 Ha. 507; *Yeats v. Yeats*, 16 B. 170; see 4 Ch. D. 46; *Lee v. Lee*, 10 Jur. N. S. 1041; *Spencer v. Ward*, 9 Eq. 507; *In re Basset's Estate*; *Perkins v. Fladgate*, 14 Eq. 54.

The fact that a blank is left for the insertion of the names of the legatees makes no difference. *McKechnie v. Vaughan*, 15 Eq. 289.

Evidence of intention to benefit certain children.

In such cases evidence of intention is not admissible to show that the testator meant certain of the children, or the children of a particular marriage who may correspond in number with the number mentioned in the will. *Daniell v. Daniell*, 3 De G. & S. 337; *Matthews v. Foulshaw*, 12 W. R. 1141.

Thus under a bequest to the two children of my son Joseph, who had four living at the date of the will, two by a first and two by a second marriage, all the children took, and evidence of an intention to benefit the children of the first marriage was not admitted. *Matthews v. Foulshaw*, *supra*.

On the same principle, a gift to the five daughters of A., who has one daughter and five sons, goes to the daughter. *Lord Selsey v. Lord Lake*, 1 B. 151. See *Berkeley v. Pulling*, 1 Russ. 496.

But a gift of 100*l.* a-piece to the four sons of A. who had

three sons and a daughter, includes the daughter, the intention being to give four legacies. *Lane v. Green*, 4 De G. & S. 239. Chap. XXIII.

If there is anything to indicate which of the children the testator meant—for instance, an allusion to their residence—the rule of course does not apply. *Wrightson v. Calvert*, 1 J. & H. 250. See *Hampshire v. Peirce*, 2 Ves. sen. 216. Explanatory context.

So where the gift was to the three children of W., widow of W., and the widow of W. had, at the date of the will, married again, and there were two children by W., and six by her second marriage then living, it was held that the two children by the first marriage were alone intended to take. *Newman v. Piercey*, 4 Ch. D. 41.

It appears never to have been decided whether, when the number of children living at the date of the will is erroneously stated, children born after the date of the will and before the testator's death would be included.

### C. RULES FOR ASCERTAINING THE CLASS.

It appears to be settled, that the same rules are applicable in the case of realty and personalty for the purpose of fixing the period, when the persons to take under a class name are to be ascertained, though the reasons for the rules in the case of personalty, which it is desirable to distribute as soon as possible, do not apply to realty. 2 Jarm. 144; Williams on Seisin, 208. Distinction between realty and personalty.

The rules may be stated as follows:—

1. If there is a direct devise of real estate to the children of A., those living at the testator's death take to the exclusion of those born afterwards. *Singleton v. Gilbert*, 1 Cox. 68; 1 B. C. C. 542. See, however, *Fearne*, Cont. Rem. 514, note *l.*; *Dunning*, Conc. Prec. 218, note; *Cook v. Cook*, 2 Vern. 544; *Weld v. Bradbury*; *ib.* 560, and cases there cited; *Mogg v. Mogg*, 1 Mer. 654; *Eddowes v. Eddowes*, 30 B. 603. Direct devise to children.

The cases of *Mogg v. Mogg* and *Eddowes v. Eddowes* cannot be said to be direct authorities upon this point, as the devise there was to the children "now born or hereafter to be born."

Chap. XXIII.Direct  
bequest.

It is clear that the rule above stated applies to an immediate bequest of personalty. *Hill v. Chapman*, 1 Ves. J. 405; 3 B. C. C. 391.

Effect of gift  
over.

The class will not be enlarged by a gift over on death of any of the class under twenty-one, nor by a gift over in default of children. *Davidson v. Dallas*, 14 Ves. 576; *Berkeley v. Swinburne*, 16 Sim. 275; *Andrews v. Partington*, 3 B. C. C. 401; *Scott v. Harwood*, 5 Mad. 332; see *Hutcheson v. Jones*, 2 Mad. 124.

No children  
at death.

If there are no children at the testator's death there appears to have been some doubt whether in such a case a devise of real estate would not altogether fail. In all probability, however, such a devise would go to all the children born at any time after the testator's death. See *Fearne*, 532; *Shep. Touch.* 438.

This is settled as regards personalty. *Weld v. Bradbury*, 2 Vern. 705; *Shepherd v. Ingram*, Amb. 448; *Hutcheson v. Jones*, 2 Mad. 124; *Harris v. Lloyd*, T. & R. 310.

Contingent  
remainder.

2. A devise of the legal estate to A. for life with remainder to a class of children is governed, in the case of wills not executed, revived, or republished after the 2nd of August, 1877, by the rules of law applicable to contingent remainders; that is to say, only those children can take whose interests become vested before the determination of the life interest. If there are none at that time whose interests have become vested the devise in remainder fails. *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; *Price v. Hall*, 5 Eq. 399; *Percival v. Percival*, 9 Eq. 386; *Brackenbury v. Gibbons*, 2 Ch. D. 417; *Cunliffe v. Brancker*, 3 Ch. D. 393.

This rule does not apply where the devise is to children born at the death of the tenant for life or thereafter to be born, which must be construed as an executory devise, as otherwise it could not take effect as regards after-born children. *In re Lechmere & Lloyd*, 18 Ch. D. 524; *Miles v. Jarvis*, 24 Ch. D. 633.

Copyholds.

Contingent remainders of copyholds were destroyed in the same way by the determination of the particular estate before the remainders become vested. *Lane v. Pannel*, 1 Roll. Rep. 238, 317, 438; *Fearne*, 310, 320; *Scriven on Copyholds*, 5th Ed. 281.

On the other hand, it seems a contingent remainder in an estate *pur autre vie* requires no particular estate to support it. Chap. XXIII.  
See *Pickersgill v. Grey*, 10 W. R. 207; 31 L. J. Ch. 394.

By 40 & 41 Vict. c. 33, it is enacted :—

40 & 41 Vict.  
c. 33.

Every contingent remainder created by any instrument executed after the passing of this Act (2nd of August, 1877), or by any will or codicil, revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use, or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, or other executory limitation.

It has been suggested that this Act does not apply where the remainder has become vested in one member of a class, as in such a case it cannot be said that the particular estate has determined “before the contingent remainder vests.” Williams on Seisin, pp. 205—208.

If the legal estate is devised to trustees, or is outstanding, for instance in a mortgagee, children born after the determination of the life estate may take a share, but it seems the time at which the class is to be fixed will be determined by the rules applicable to personalty. *In re Eddels' Trusts*, 11 Eq. 559; *Berry v. Berry*, 7 Ch. D. 657; *Astley v. Micklethwait*, 15 Ch. D. 59. See Dunning, Conc. Prec. 218, note.

Equitable  
remainder in  
land.

In the case of a gift of personalty in remainder or after a trust to accumulate, all children born at the death of the testator and coming into *esse* before the death of the tenant for life or the end of the period of accumulation, take a share to the exclusion of those born afterwards. *Middleton v. Messenger*, 5 Ves. 136; *Odell v. Crone*, 3 Dow. 61; *Holland v. Wood*, 11 Eq. 91; *Barnaby v. Tassell*, 11 Eq. 363; *Watson v. Young*, 28 Ch. D. 436.

Future gifts.

If the life interest is determinable on bankruptcy or some other event, the class is fixed at the time of determination, unless there is something in the context to enlarge the class, such as

Chap. XXIII. postponement of payment till the death of the tenant for life or a declaration that the fund is to go as if the tenant for life were dead. *Re Smith*, 2 J. & H. 594; *Aylwin's Trusts*, 16 Eq. 585; *Brandon v. Aston*, 2 Y. & C. C. 24, 30; *In re Bedson's Trusts*, 25 Ch. D. 458; 28 Ch. D. 523.

If no children are born before the death of the tenant for life all after-born children are admitted. *Chapman v. Blissett*, Cas. tem. Talb. 145; *Wyndham v. Wyndham*, 3 B. C. C. 58.

But this rule does not apply, if there is a clear intention, that distribution is to be made once for all when the fund falls into possession. *Godfrey v. Davis*, 6 Ves. 43; explained in *Conduitt v. Soane*, 4 Jur. N. S. 502.

Gift of  
reversionary  
property.

3. And on the same principle if the interest bequeathed is reversionary, the class remains open till the interest falls into possession. *Walker v. Shore*, 15 Ves. 122; *Harvey v. Stacey*, 1 Dr. 122.

But this does not apply, where a residue is given and some portion of the property which falls into it is reversionary, unless there are provisions indicating an intention to treat the reversionary property separately. *Hill v. Chapman*, 1 Ves. J. 405; 3 B. C. C. 391; *Hagger v. Payne*, 23 B. 474; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *King v. Cullen*, 2 De G. & S. 252.

Gift to be  
paid at  
twenty-one.

4. If there is a direct gift "to be paid at twenty-one, or to such as attain twenty-one:"

a. If any member of the class attain twenty-one in the testator's lifetime the class is fixed at the testator's death. *Hagger v. Payne*, 23 B. 474.

A child *en ventre* at the testator's death was held not to be included in *In re Gardiner's Estate*; *Garratt v. Weeks*, 20 Eq. 647, *sed quære*, see *Bortoft v. Wadsworth*, 12 W. R. 523.

b. If none attain twenty-one in the testator's lifetime, all born at the testator's death and coming into existence before the eldest attains twenty-one are admitted. *Hoste v. Pratt*, 3 Ves. 729; *Balm v. Balm*, 3 Sim. 492; *Blease v. Burgh*, 2 B. 221; *Oppenheim v. Henry*, 10 H. 441; *Gillman v. Daunt*, 3 K. & J. 48; *Lock v. Lambe*, 4 Eq. 372; *Gimblett v. Purton*, 12 Eq. 427.

As a rule each child attaining twenty-one is entitled to have

his share paid to him, but this is not so if the whole income is given for maintenance and there are children who require maintenance. *Berry v. Briant*, 2 Dr. & Sm. 1. Chap. XXIII.

c. It seems doubtful whether, if there are no children at the testator's death, all would be admitted whether born before or after the eldest attains twenty-one. *Armitage v. Williams*, 27 B. 346, better reported in 7 W. R. 650, which seems an authority for the affirmative, was probably decided on the authority of *Mainwaring v. Beevor*, *post*; see *Harris v. Lloyd*, T. & R. 310.

There are the following exceptions to the rule:—

Exceptions to  
the general  
rule.

a. If the time fixed for payment would carry the class beyond the limits of perpetuity, members coming into existence after the testator's death, and before the time of payment, will not be admitted. *Kevern v. Williams*, 5 Sim. 171; *quære* as to *Elliott v. Elliott*, 12 Sim. 276.

b. Maintenance out of the shares or presumptive shares of children will not extend the class. *Gimblett v. Purton*, 12 Eq. 427. Maintenance  
out of vested  
and presumptive  
shares.

But if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Gray*, 6 Eq. 215.

In *Defflis v. Goldschmidt*, 19 Ves. 566; 1 Mer. 417, where expressions were used showing that the parent could not die leaving a child who would not be entitled to maintenance, all children were included. See *Evans v. Harris*, 5 B. 45.

c. If distribution is to be made when all attain twenty-one, or when the youngest attains twenty-one, all children will be admitted. *Hughes v. Hughes*, 3 Bro. C. C. 434; 14 Ves. 256; *Mainwaring v. Beevor*, 8 Ha. 44; and perhaps *Armitage v. Williams*, 27 B. 346; 7 W. R. 650. Distribution  
when the  
youngest  
attains  
twenty-one.

On the other hand, the class would again be restricted if the distribution is to be made when the youngest for the time being attains twenty-one. *Gooch v. Gooch*, 14 B. 565; 3 D. M. & G. 366.

d. When the gift is of a particular sum to each member of the Gift of fixed

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sum to each  
member of a  
class.

Gift to  
children  
who attain  
twenty-one  
after life  
interest.

Children *en  
ventre* when  
the class  
closes are  
admitted.

Case of child  
conceived  
before but  
born after  
marriage.

class, the class is fixed at the death of the testator, whether possession is postponed to twenty-one or not. *Ringross v. Bramham*, 2 Cox, 384; *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Butler v. Lowe*, 10 Sim. 317.

And if there are no children then in existence, the gift fails. *Mann v. Thompson*, Kay, 638; *Rogers v. Mutch*, 10 Ch. D. 25.

5. If the gift is to A. for life, then to children who attain twenty-one, the class will be fixed as regards exclusion at the death of A., or when the eldest attains twenty-one, whichever is last. *Clarke v. Clarke*, 8 Sim. 59; *Robley v. Ridings*, 11 Jur. 813; *Beckton v. Barton*, 27 B. 99; 5 Jur. N. S. 349; *Parsons v. Justice*, 34 B. 598; *In re Emmet's Estate*; *Emmet v. Emmet*, 13 Ch. D. 484.

In *Parsons v. Justice* a direction that no child should be excluded in consequence of any other child having attained a vested interest had no effect in extending the class.

6. A child *en ventre* at the time when the class closes is admitted to share, even though the word "living" or "born" be added to the description. *Doe v. Clarke*, 2 H. Bl. 399; *Clarke v. Blake*, 2 B. C. C. 319; *Trower v. Butts*, 1 S. & St. 181.

*Quære* whether *Garratt v. Weekes*, 20 Eq. 647; is consistent with the other authorities.

Similarly, when there is a gift to the children of a tenant for life, a gift over, if at the end of five years she has not had a child, will not take effect if she then has a child *en ventre*. *Pearce v. Carrington*, 8 Ch. 69.

A child *en ventre* is for this purpose supposed to be born at the time of distribution; if, therefore, supposing it to have been then born, it would have been illegitimate, it will not be admitted to take, notwithstanding the marriage of its parents before its birth. *In re Corlass*, 1 Ch. D. 460.

But though a child *en ventre* is looked upon as existing for the purpose of receiving a benefit, it is not looked upon as existing for any other purpose; if, for instance, distribution is to be made when the youngest child for the time being attains twenty-one, the fact that there is a child *en ventre* when the youngest attains twenty-one will not postpone the division. *Blasson v. Blasson*, 2 D. J. & S. 665.

#### D. HOW THE CLASS TO TAKE IN DEFAULT OF APPOINTMENT IS TO BE ASCERTAINED.

When there is a gift to children, as A. may appoint, with no gift in default of appointment, and no appointment is made, similar rules apply as to the period at which the class is to be ascertained.

At what time the class to take in default of appointment is to be fixed.

1. A direct gift to children, as A. may appoint, goes apparently to all the children living at the death of the testator, to the exclusion of those born afterwards, though before the death of A. *Coleman v. Seymour*, 1 Ves. sen. 209.

2. A gift to A. for life, with remainder to his children as he shall appoint, goes to all the children born in the testator's lifetime and coming into being before A.'s death. *Crone v. Odell*, 1 Ba. & Be. 449; 3 Dow. 68; *Norman v. Norman*, Bea. 430; *Lambert v. Thwixites*, L. R. 2 Eq. 151.

3. If the only gift is through the power, so that the children take by implication only, in default of appointment, the rules are the same.

Case when the only gift is through the power.

Thus, where there is a power to A. to dispose of certain property among children, the gift, in default of appointment, goes to those born at the testator's death, to the exclusion of those born subsequently. *Longmore v. Broom*, 7 Ves. 124.

And where the gift is to A. for life, and then to dispose of the capital among his children, all children born before A.'s death take a share. *Grievesson v. Kirsopp*, 2 Kee. 653.

4. If the donee of the power and the tenant for life are different persons, and the donee dies before the tenant for life, the class is ascertained at the death of the latter. *White's Trusts*, Johns. 656.

And, apparently, if there is anything to show that personal enjoyment by the beneficiaries was intended, those dying before the tenant for life would be excluded. *White's Trusts*, *supra*; *Curthrew v. Enraght*, 20 W. R. 743; *In re Phene's Trusts*, 5 Eq. 346.

At what time the class would be ascertained if the donee of the power survives the tenant for life is uncertain; though by

Chap. XXIII. analogy to the case of a direct gift it seems it would be ascertained at the death of the tenant for life, and not of the donee of the power.

Power to  
appoint by  
deed or will.

5. When there is a direct vested gift to children as A. shall appoint, the fact that the power is to appoint by deed or will, or by will only, will not affect the class to take in default of appointment. *Casterton v. Sutherland*, 9 Ves. 445; *Falkner v. Lord Wynford*, 15 L. J. Ch. 8; *Lambert v. Thwaites*, L. R. 2 Eq. 151, see *Winn v. Fenwick*, 11 B. 438, there discussed.

6. If the only gift is through the power, only those will take in default of appointment who could have taken under the power; and therefore if the power is to dispose of certain property by will, only those who survive the donee can take in default of appointment. *Walsh v. Wallinger*, 2 R. & M. 78; *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 B. 469; *Freeland v. Pearson*, 3 Eq. 658; *In re Susanni's Trusts*, 47 L. J. Ch. 65; *Sinnott v. Walsh*, 5 L. R. Ir. 27; see *Brown v. Pocock*, 6 Sim. 257, where it does not appear from the report whether the wife survived her husband or not, see L. R. 2 Eq. 157.

7. On the other hand, if the gift is to such children of A. as he shall by any writing appoint, all his children, whether or not they survive prior tenants for life or their own parent, are entitled to share. *Wilson v. Duguid*, 24 Ch. D. 244.

#### E. HOW FAR WORDS OF FUTURITY AFFECT THE RULES FOR ASCERTAINING THE CLASS.

How far  
words of  
futurity affect  
the ordinary  
rules for  
fixing the  
class to take  
under a gift  
to children.

Mere words of futurity, as, for instance, a gift to the children that may be born, will not extend the class. *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Townsend v. Early*, 3 D. F. & J. 1; see *Gibbons v. Gibbons*, 6 App. C. 471.

Where the words are "born or to be born," the rules appear to be—

Children born  
or to be born.

1. When the gift is after a life estate, such words will not extend the class. *Sprackling v. Rainer*, 1 Dick. 344; *Whitbread v. St. John*, 10 Ves. 152; *Parsons v. Justice*, 34 B. 598.

The case is of course different if the gift is to children "now

born or who shall be born in the lifetime of their parents." Chap. XXIII.  
*Scott v. Lord Scarborough*, 1 B. 154.

2. The rule is the same where the gift is to children now born or who may be born hereafter who shall attain twenty-one. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Gray*, 29 B. 447; 6 Eq. 215.

3. In the case of a direct gift of personalty to children, the words "now born or to be born hereafter" would probably be held to be intended to refer to children born between the date of the will and the death. *Dias v. De Livera*, 5 App. C. 123.

In the case, however, of a direct devise of realty under similar words, children born after the testator's death have been included. *Mogg v. Mogg*, 1 Mer. 654; *Gooch v. Gooch*, 14 B. 565; *Eddowes v. Eddowes*, 30 B. 603.

For the meaning of the words "born in due time" see *In re Wass*; *Marshall v. Mason*, W. N. 1882, 158.

4. If, however, the gift is of a legacy to each of the children begotten or to be begotten, the class will not be extended beyond the testator's death, as not merely the distribution of what the children are to take, but of the whole estate of the testator, would be indefinitely postponed. *Butler v. Lowe*, 10 Sim. 317.

#### F. DISTRIBUTION PER CAPITA AND PER STIRPES.

A gift to A. and the children of B. goes *primâ facie* to all *per capita*, and not *per stirpes*. *Dowding v. Smith*, 3 B. 541; *Rickabe v. Garwood*, 8 B. 579.

So, too, a gift to the children of A. and B., or even to class A., and class B. and C., goes *per capita* to all. *Dugdale v. Dugdale*, 11 B. 402; *Dowding v. Smith*, 3 B. 541; *Pattison v. Pattison*, 19 B. 638; *Armitage v. Williams*, 27 B. 346; *Rook v. A.-G.*, 31 B. 313; *Amson v. Harris*, 19 B. 210; *Tyndale v. Wilkinson*, 23 B. 74; *Baker v. Baker*, 6 Ha. 269; *Fletcher v. Fletcher*, 9 L. R. Ir. 301.

So a gift of two fourth parts to the children of A. and the children of B. goes *per capita*. *Lady Lincoln v. Pelham*, 10 Ves. 166.

Whether a gift to the children of several parents to be distributed *per stirpes* or *per capita*.

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Gifts to  
parents and  
their issue.

Similarly a gift to several and their issue, or to the children and grandchildren of A., goes to all children and grandchildren coming into being before the period of distribution *per capita*. *Barnaby v. Tassell*, 11 Eq. 363; *Lea v. Thorp*, 6 W. R. 480; 4 Jur. N. S. 447; 27 L. J. Ch. 649.

In the same way a gift after a life interest to surviving children and their issue goes to all the children and issue who survive the period of distribution *per capita*. *Re Fox's Will*, 35 B. 163; 13 W. R. 1013; *Cancellor v. Canceller*, 11 W. R. 16; 2 Dr. & Sm. 199. *Shailer v. Groves*, which, as reported in 6 Hare, 162, might be cited in favour of a different construction, is there wrongly reported. See 11 Jur. 485; 16 L. J. Ch. 367; 2 Jarman Ed. 4, 737.

The rule applies where the classes are next-of-kin or families. *Rook v. A.-G.*, 31 B. 313; *Barnes v. Patch*, 8 Ves. 603.

A direction that parents and children are to be classed together, and share in equal proportions, will not import a distribution *per stirpes*. *Turner v. Hudson*, 10 B. 222.

Distribution  
*per stirpes*.

The following indications of intention have been held sufficient to import a distribution *per stirpes*—

a. A gift of one share in certain events to the other legatees *per stirpes*. *Nettleton v. Stephenson*, 18 L. J. Ch. 191.

b. A gift of the share of a child dying, not to the other members of the class, but to the brothers and sisters of the child. *Archer v. Legg*, 31 B. 187; see *Ayscough v. Savage*, 13 W. R. 373.

c. A gift of the income to four persons till certain children attained twenty-one, and then a gift of the principal to three of those persons and the children equally. *Brett v. Horton*, 4 B. 239.

d. A direction that the share is to be divided in equal shares if more than one of "such respective issue." *Davis v. Bennett*, 4 D. F. & J. 327.

e. If the issue of a *stirps* are treated as taking among them only one equal share, the construction *per stirpes* will be adopted. *Brett v. Horton*, 4 B. 239; *Hunt v. Dorsett*, 5 D. M. & G. 570.

As to the word "devolve," see *Stonor v. Curwen*, 5 Sim. 264.

A gift to several and their issue "*per stirpes*," or a direction

that issue are to take only their parents' share, is sufficient to show that the issue were not meant to take in competition with the original takers. *Pearson v. Stephen*, 2 Dow. & Cl. 328; 5 Bl. N. S. 203; *Johnson v. Cope*, 17 B. 561. Chap. XXIII.

Whether a direction that issue are to take only the share their ancestor would have taken will have the effect of making the distribution stirpital throughout seems not to be settled. In what cases the distribution will be per stirpes throughout.

Where the direction is that the issue are to take a parent's share, and the word "parent" is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be per stirpes throughout. *Ross v. Ross*, 20 B. 645; *In re Orton's Trust*, 3 Eq. 375; *Palmer v. Cruttwell*, 8 Jur. N. S. 479. The word parent used in a recurring or sliding sense.

So, too, where the direction is that the children or grandchildren are to take an original share between them. *Powell v. Powell*, 28 L. T. N. S. 730.

But a mere direction that the share of any of the original takers dying is to go to his issue would, it seems, not have the effect of preventing remoter issue from taking that share with issue less remote per capita between them. *Birdsall v. York*, 5 Jur. N. S. 1237; *Southam v. Blake*, 2 W. R. 446; *Weldon v. Hoyland*, 4 D. F. & J 564. *Robinson v. Sykes*, 23 B. 40, which is contra, was on a marriage settlement.

If the gift is to several, and their issues per stirpes, the distribution per stirpes will be carried through throughout, so that no children or remoter issue can take in competition with the parents. *Dick v. Lacy*, 8 B. 214; *Gibson v. Fisher*, 5 Eq. 51. Effect of the words per stirpes.

When the gift is to several for life, and then to their children, the cases are not easily reconcilable. Gift to parents for life and then to their children.

1. It seems clear that a gift to A. and B., as tenants in common for their lives, and then at their death, or at their deaths, or at the death of A. and B., to their children, goes, upon the death of each tenant for life, to his children. *Flinn v. Jenkins*, 1 Coll. 365; *Tanière v. Pearkes*, 2 S. & St. 383; *Willes v. Douglas*, 10 B. 47; *Arrow v. Mellish*, 1 De G. & S. 355; *Turner v. Whittaker*, 23 B. 196; *Saril v. Saril*, 23 B. 87; see, too, *Doe d. Patrick v. Royle*, 13 Q. B. 100; *Brown v. Jarvis*, 2 D. F. & J. 168.

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If the gift is after the deaths of the tenants for life to their children and grandchildren, the families take *per stirpes*, but the children and grandchildren take *per capita, inter se*. *Barnaby v. Tassell*, 11 Eq. 363.

But if the testator goes on to explain what he means by "their children," by adding "that is to say, the children of A. and B.," they take *per capita*. *Abrey v. Newman*, 16 B. 431.

Gift to A. and B. for life, then to children of A. and B.

2. If the gift be to A. and B. for their lives, and at their death not to their children but to the children of A. and B., there seems less reason for contending that the children are to take *per stirpes*.

However, in *Wells v. Wells*, 20 Eq. 342, the construction *per stirpes* was adopted. See *Milnes v. Aked*, 6 W. R. 430; *Sutcliffe v. Howard*, 38 L. J. Ch. 472; *Re Nott's Trusts*, 20 W. R. 569.

In such a case a superadded direction that, "if there is but one child, the whole is to go to such only child," would afford an argument that the distribution was meant to be *per capita*. *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; 2 W. R. 672; *Swabey v. Goldie*, 1 Ch. D. 380; see, too, *Peacock v. Stockford*, 7 D. M. & G. 129.

Gift to children after death of surviving tenant for life.

3. If the gift to the children is not till after the death of the survivor of the tenants for life, it would seem the distribution will be *per capita*; at any rate if the gift is to the children of A. and B., and not merely to "their children." *Malcolm v. Martin*, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; *Stevenson v. Gullan*, 18 B. 590; *Nockolds v. Locke*, 3 K. & J. 6; *Swabey v. Goldie*, 1 Ch. D. 380; see *Alt v. Gregory*, 8. D. M. & G. 221. Perhaps *Smith v. Streatfield*, 1 Mer. 358, comes under this head.

Substitutional gifts.

If the gift is substitutional, as to several or their children, the children take *per stirpes*. *Congreve v. Palmer*, 16 B. 435; *Timins v. Stackhouse*, 27 B. 434; *Gowling v. Thompson*, 19 L. T. N. S. 242; *In re Sibley's Trusts*, 5 Ch. D. 494.

A simple gift, however, to several or their issue, though it would import a distribution *per stirpes* among the families, would not prevent all the issue of each family from taking *per capita inter se*. *Gowling v. Thompson*, 19 L. T. N. S. 242; *In re Sibley's Trusts*, 5 Ch. D. 493.

Under a gift to cousins then living and the issue of those then dead, according to the stocks, where the cousins were referred to as the children of the testator's late aunts and uncles, it was held that the cousins and not the aunts and uncles were to be taken as the stocks. *In re Wilson; Parker v. Winder*, 24 Ch. D. 664. Chap. XXIII  
How the  
stirpes ascer-  
tained.

Where the gift is to the descendants of A. and B. *per stirpes*, Lord Westbury held that there should be as many shares as there are families in existence at the testator's death, each family taking a share. *Robinson v. Shepherd*, 10 Jur N. S. 53; 12 W. R. 234; 4 D. J. & S. 129.

On the other hand, Lord Romilly held that A. and B. were the original *stirpes*, and that this mode of division was to be carried out throughout. *Gibson v. Fisher*, 5 Eq. 51.

## CHAPTER XXIV.

## MEANING OF WORDS DESCRIPTIVE OF RELATIONSHIP.

## I. NEPHEWS AND NIECES.

**Chap. XXIV.**

Nephews and  
nieces mean  
*primâ facie*  
children of  
brothers and  
sisters.

NEPHEWS and nieces mean *primâ facie* the children of brothers and sisters, including those of the half blood. *Falkner v. Butler*, Amb. 514; *Grieves v. Rawley*, 10 Ha. 63; *Cotton v. Scarancke*, 1 Mad. 45; see *Brigg v. Brigg*, 33 W. R. 454.

The meaning of the word will not be enlarged where the gift is to each of the present nieces of A., who had only one niece of the first degree living at the date of the will. *Crook v. Whitley*, 7 D. M. & G. 490.

The fact that the gift is to "nephews, descendants of my brothers," will not enlarge the class. *Williamson v. Moore*, 10 W. R. 536.

The fact that a great-niece or a wife's niece has been previously called a niece will not enlarge the meaning of the word. *Shelley v. Bryer*, Jac. 207; *Thompson v. Robinson*, 27 B. 486; *Smith v. Liddiard*, 3 K. & J. 252; *Wells v. Wells*, 18 Eq. 504; *Merrill v. Morton*, 43 L. T. N. S. 750; 29 W. R. 394.

Nor will a gift to my great-nephew, and such *other* of my nephews and nieces as shall be living at my death. *Blower's Trusts*, 11 Eq. 97; 6 Ch. 351.

In what cases  
a wife's  
nephew may  
take.

But if the testator has at the date of his will and death no nephews and nieces of his own, and there are nephews and nieces of his wife, they will take, though he may have had brothers and sisters living at the date of his will. *Hogg v. Cook*, 32 B. 641; *Sherratt v. Mountfield*, 15 Eq. 305; 8 Ch. 928; see *Adney v. Greatrex*, 17 W. R. 637.

The words "nephews and nieces on both sides" include a wife's nephew. *Frogley v. Phillips*, 30 B. 168; 3 D. F. & J. 466. Chap. XXIV.

If a great-nephew is referred to as taking a share of a gift to nephews and nieces, the words will be held to include grand-nephews and grand-nieces. *Weeds v. Bristow*, 2 Eq. 333.

And if the testator expressly defines a niece, as "my niece, daughter of my nephew," nephews and nieces will include grand-nephews and grand-nieces. *James v. Smith*, 14 Sim. 214.

A bequest to "male nephews" has been held to include only sons of brothers. *Lucas v. Cuddy*, I. R. 10 Eq. 514.

## II. COUSINS.

The word cousins means primarily children of uncles and aunts. *Sanderson v. Bayley*, 4 M. & Cr. 56; *Caldecott v. Harrison*, 9 Sim. 457; *Stoddart v. Nelson*, 6 D. M. & G. 68; *Stevenson v. Abingdon*, 31 B. 305; *Burbey v. Burbey*, 9 Jur. N. S. 96. Cousins.

Second cousins are persons who have the same great-grand-father or great-grandmother, and will not therefore include first cousins once removed. *Corporation of Bridgnorth v. Collins*, 15 Sim. 541; *In re Parker*; *Bentham v. Wilson*, 50 L. J. Ch. 639; 15 Ch. D. 528; 17 Ch. D. 262. Second  
cousins.

But if there are no second cousins the term will include all within the same degree of relationship, unless there is an intention to exclude first cousins twice removed, for instance, by a substitutionary gift to the children of second cousins who had died. *Slade v. Fooks*, 9 Sim. 386; *In re Bonner*; *Tucker v. Good*, 19 Ch. D. 201.

In a gift to "first and second cousins," the words will have their strict meaning, unless there is something to show that the testator is not using them in their proper sense. *In re Parker*; *Bentham v. Wilson*, 15 Ch. D. 528, where *Mayott v. Mayott*, 2 B. C. C. 125, is explained, and *Charge v. Goodyer*, 3 Russ. 140; *Silcox v. Bell*, 1 S. & St. 301, are disapproved; see *Wilks v. Bannister*, 33 W. R. 922. First and  
second  
cousins.

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## III. GRANDCHILDREN.

Grand-children.

Similarly, grandchildren, unless explained by the context, will not include great-grandchildren. *Oxford v. Churchill*, 3 V. & B. 59.

But if the gift is to grandchildren herein named, a great grandchild who has previously been called grandchild may take. *Hussey v. Berkeley*, 2 Ed. 194.

## IV. ISSUE.

Issue.

A bequest to issue as purchasers goes to all issue, children, grandchildren, &c., as joint tenants, and all come in who are in existence at the time of vesting in possession. *Davenport v. Hanbury*, 3 Ves. 257; *Maddock v. Legg*, 25 B. 531; *Weldon v. Hoyland*, 4 D. F. & J. 564; *Hobgen v. Neale*, 11 Eq. 48.

And in the case of a devise of realty, all such issue take as joint tenants for life, or in fee, according as the will dates before or since the Wills Act. *Cook v. Cook*, 2 Vern. 545; *Mogg v. Mogg*, 1 Mer. 654, 689; *Dalzell v. Welch*, 2 Sim. 319.

Exceptions.

1. In the case of realty, however, this construction will be excluded if there is a general intention manifest to keep the estates together in a single line of enjoyment, in which case the estates will devolve according to the rule in *Mandeville's Case*. *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160; and see *Whitelock v. Heddon*, 1 B. & P. 243.

In what cases issue means children.

2. The generality of the word issue will be restrained if the testator explains that he meant by issue children.

a. This will be the case if the word issue is coupled with parent: for instance, if, in a substitutional gift to issue, the issue are directed to take their parent's share. *Sibley v. Perry*, 7 Ves. 522; *Pruen v. Osborne*, 11 Sim. 132; *Smith v. Horsfull*, 25 B. 628; *Stevenson v. Abingdon*, 31 B. 305; *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Martin v. Holgate*, L. R. 1 H. L. 175; *Bryden v. Willett*, 7 Eq. 472; *Heasman v. Pearse*, 7 Ch. 275; *In re Judd's Trusts*, W. N. 1884, 206; see, however, *Ralph v. Carrick*, 11 Ch. D. 873.

This rule applies to a deed. *Barraclough v. Shillito*, 32 W. Chap. XXIV.  
R. 875.

If, however, the word parent is not used in the sense of the first taker, whose share the issue are to take by substitution, but in what might be called a sliding sense, so as to denote child, grandchild, great-grandchild, and so on, it will not have the effect of cutting down issue to children. See *Ross v. Ross*, 20 B. 645, where the testator distinguished between a parent's share and a child's share, children being the first takers.

The fact that there is a gift over in default of issue of the first takers affords an argument against construing issue as equivalent to children, though it is not in itself conclusive. See *cases supra cit.*; *Re Kavanagh's Will*, 13 Ir. Ch. 120; *Corrie's Will*, 32 B. 426. Effect of a gift over in default of issue.

But if the gift over is not merely in default of issue but in default of "children or issue," it would seem that the word issue cannot be restricted, though the issue are directed to take only a parent's share. *Ross v. Ross*, 20 B. 645; *Ralph v. Carrick*, 11 Ch. D. 873, 883. Gift over in default of children or issue.

b. Issue of issue must mean issue of children, if not children of children. *Pope v. Pope*, 14 B. 593; *Williams v. Teale*, 6 Ha. 239; *Heasman v. Pearse*, 7 Ch. 275. Issue of issue.

So, too, children of issue will mean children of children. *Fairfield v. Bushell*, 32 B. 158.

c. In a marriage settlement limitations in favour of the "issue of the marriage" would probably be confined to children. *Issue of the marriage in a settlement.* *In re Dixon's Trusts*, I. R. 4 Eq. 1; *In re Denis's Trusts*, I. R. 10 Eq. 81; see *Donoghue v. Brooke*, I. R. 9 Eq. 489.

As to the meaning of legal issue by marriage in a will, see *Reed v. Braithwaite*, 11 Eq. 514.

The words issue lawfully begotten of a person will not confine issue to children. *Hayden v. Willshire*, 3 T. R. 372; *Evans v. Jones*, 2 Coll. 516. Issue lawfully begotten.

d. If after a gift to issue the testator adds, "and if but one then to such only child," issue will mean children. *In re Hopkins' Trusts*, 9 Ch. D. 131; *In re Biron*, 1 L. R. Ir. 258; see *Carter v. Bental*, 2 B. 551; *In re Meade's Trusts*, 7 L. R. Ir. 51.

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Effect of  
gift over.

*e.* In a gift to the issue of a tenant for life and their heirs, followed by a gift over if the tenant for life dies without children, issue means children. *Morgan v. Thomas*, 9 Q. B. D. 643.

One re-  
mainder to  
children,  
another to  
issue.

The fact that in one bequest after a gift for life the remainder is given to children, while in another gift in a later part of the will to the same tenants for life the remainder is given to issue, will not restrict the meaning of issue in the second gift. *Waldron v. Boulter*, 22 B. 284.

Issue may  
have different  
meanings in  
different gifts.

The fact that in one part of the will there is an explanatory context, showing that the testator has used issue as equivalent to children will not be sufficient to give the word a restricted meaning in another part of the will where there is no explanatory context. *Head v. Randall*, 2 Y. & C. C. 231; see *Hedges v. Harpur*, 9 B. 479; *Re Corrie's Will*, 32 B. 426; *In re Warren's Trusts*, 26 Ch. D. 208.

Successive  
limitations  
of same  
property.

But where in successive limitations of the same property to tenants for life and then to issue the word is in one case explained to mean children, it may have the same meaning in the other limitations. *Foster v. Wybrants*, 1. R. 11 Eq. 40.

And if the testator has frequently used the word issue as equivalent to children, it will have that meaning in a limitation where there is no context to confine it. *Ridgeway v. Munkittrick*, 2 Dr. & War. 84; *Rhodes v. Rhodes*, 27 B. 413; *In re Harrison's Estate*, 3 L. R. Ir. 114.

Explanatory  
reference.

The testator may explain what he meant by issue, for instance, by referring to a gift in favour of issue as being a gift in favour of children. *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Baker v. Bayldon*, 31 B. 209.

At what time  
the class of  
issue is to be  
ascertained in  
a substitu-  
tional gift.

When the gift to issue is substitutional, the class of issue is not to be ascertained once for all at the death of the parent, but it will include persons subsequently born before the period of distribution. *In re Sibley's Trusts*, 5 Ch. D. 494; *In re Jones's Estate*; *Hume v. Lloyd*, 47 L. J. Ch. 775; overruling *Hobgen v. Neale*, 11 Eq. 48.

In the case of a gift in remainder to issue the same rule applies; that is to say, all the issue born at the testator's death

and coming into being before the death of the tenant for life are admitted. *Surridge v. Clarkson*, 14 W. R. 979. Chap. XXIV.

If the gift is to several for life, and then to their issue, with cross-remainders between them, the class of issue to take under the cross-remainders is fixed once for all at the death of the parent, who is tenant for life, and not at the death of the tenant for life dying without issue. *In re Ridge's Trusts*, 7 Ch. 665. In the case of cross-remainders.

## V. DESCENDANTS.

Descendants means *prima facie* all descendants living at the time of distribution, and apparently they take *per capita*. *Crossley v. Clare*, Amb. 397; 3 Sw. 320; *Butler v. Stratton*, 3 B. C. C. 367. Descendants.

But the expression "descendants or representatives" imports a distribution *per stirpes*. *Rowland v. Gorsuch*, 2 Cox, 187.

The word descendants requires a stronger explanatory context to confine it to children than the word issue. For instance, a direction that descendants are to take a parent's share would not limit the class to children. *Ralph v. Carrick*, 11 Ch. D. 873.

It would seem that the term descendants, when used as a word of purchase, and coupled with a gift to the ancestor, has a substitutional and representative sense, so that in a gift to several and their descendants, descendants would not take in competition with their ancestor. *Tucker v. Billing*, 2 Jur. N. S. 483; and perhaps *Jones v. Price*, 6 Sim. 255, may be supported on this principle. See, too, *Smith v. Pepper*, 27 B. 86; *Best v. Stonehewer*, 34 B. 66; 2 D. J. & S. 537.

A power to appoint to descendants does not authorize an appointment to the legal personal representative of a descendant, though he may happen also to be a descendant. *In re Susanni's Trust*, 26 W. R. 93; 47 L. J. Ch. 65.

## Chap. XXIV.

## VI. RELATIONS.

Nearest relations means next of kin.

The words "nearest relations" explain themselves, and no reference to the statute is necessary to determine the persons to take. *Smith v. Campbell*, 19 Ves. 400; *Brandon v. Brandon*, 3 Sw. 312. See *Goodinge v. Goodinge*, 1 Ves. sen. 231; *Edge v. Salisbury*, Amb. 70.

Relations.

But the terms "relations" or "near relations" or "friends and relations" are of indefinite meaning, and the Courts, when compelled to determine the persons to take, have restricted them to relations capable of taking within the Statutes of Distribution, both as regards realty and personalty. *Whitehorne v. Harris*, 2 Ves. sen. 527; *Walter v. Maunde*, 19 Ves. 424; *Thwaites v. Over*, 1 Taunt. 263; *Salisbury v. Denton*, 3 K. & J. 529; *Re Caplin's Will*, 2 Dr. & Sm. 527; 34 L. J. Ch. 578.

The persons pointed out by the statute take *per capita* as joint tenants, and not in the proportions fixed by the statute. *Tiffin v. Longman*, 15 B. 275; *Eagles v. Le Breton*, 15 Eq. 148.

But they take in the proportion directed by the statute where the gift is to relations, share and share alike, as the law directs. *Fielden v. Ashworth*, 20 Eq. 410.

Power to select.

A power to select relations extends to relations generally. *Harding v. Glyn*, 1 Atk. 469; 5 Ves. 501.

But a power to distribute does not, and in default of appointment the Court will restrict the relations to those who can take under the statute. *Pope v. Whitcombe*, 3 Mer. 689; *Grant v. Lynam*, 4 Russ. 292; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Lawlor v. Henderson*, I. R. 10 Eq. 150.

Of course the testator may, by explanatory words, extend the word relations to persons not within the statute. *Devisme v. Mellish*, 5 Ves. 529; *Hibbert v. Hibbert*, 15 Eq. 372. See *Bennett v. Honeywood*, Amb. 708.

When the class to take under a gift to relations is to be ascertained.

*Prima facie* the class of relations to take is to be ascertained at the death of the propositus.

Therefore, where the gift is immediate or in remainder to the testator's relations, after gifts to persons who are some of

the next of kin, his next of kin at his death alone take. **Chap. XXIV.**  
*Rayner v. Mowbray*, 3 B. C. C. 234; *Masters v. Hooper*, 4 B. C. C. 207; *Pearce v. Vincent*, 1 Cr. & M. 598; 2 M. & K. 800; 2 Sc. 347; 2 Bing. N. C. 328; 2 Kee. 230; see *Eagles v. Le Breton*, 15 Eq. 148, where there is a discrepancy between the head note and the judgment. See *Stert v. Platel*, 5 Bing. N. C. 434.

If the gift is to such relations as survive the tenant for life the class is ascertained at the death of the ancestor, while those who die before the tenant for life are excluded. *Bishop v. Cappel*, 1 De G. & S. 411. Gift to such relations as survive the tenant for life.

The term relations, however, has not the same direct reference to the death of the propositus as heirs or next of kin, and therefore where there is a gift to A. either for life with remainder to her children, or to A. absolutely, followed by a gift over, if A. dies without issue, to the testator's relations, and A. is the sole next of kin at the date of the will and death, the class will be ascertained at A.'s death. *Marsh v. Marsh*, 1 B. C. C. 293; *Jones v. Colbeck*, 8 Ves. 38; *Lees v. Massey*, 3 D. F. & J. 113; see *post*, p. 263, *seq.* Where the tenant for life is sole next of kin at the date of the will and death.

And the testator may himself fix the time at which his relations are to be ascertained; for instance, by directing his relations to be advertised for at the death of a tenant for life, and giving the property to such of them as claim within two months after such advertisements. *Tiffin v. Longman*, 15 B. 275.

Where there is a power to appoint to relations and no gift in default of appointment: When the class to take in default of appointment is to be ascertained.

1. If there is no life interest, and the power is a general power to appoint to the testator's relations, it seems the class to take will be ascertained at the death of the testator and not when the power expires. *Cole v. Wade*, 16 Ves. 27; in which case, however, the actual point did not arise, since the next of kin at the testator's death, and the time when the power expired, were the same.

2. If there is a life interest and the tenant for life has power to appoint to the testator's or his own relations, the class is to be ascertained at the death of the tenant for life, whether the power is to appoint by deed or will. *Harding v. Glyn*, 1 Atk.

**Chap. XXIV.** 468; *Birch v. Wade*, 3 V. & B. 198; see, too, in *Brown v. Higgs*, 8 Ves. 561.

And it makes no difference whether the power is one of selection or distribution merely. *Pope v. Whitcombe*, 3 Mer. 689, as corrected by Lord St. Leonards on Powers, 662, and *Finch v. Hollingsworth*, 21 Beav. 112; *Cuplin's Will*, 2 Dr. & Sm. 527; see, too, *A.-G. v. Doyley*, 4 Vin. Ab. 485, where the tenant for life and the donee of the power were different persons, and the class was ascertained at the death of the tenant for life.

## VII. FAMILY.

**Family.** The word family may have a different meaning, according to the context.

1. In the case of devises of land :—

**Devise of lands.**

"If land be devised to a stock or family or house it shall be understood of the heir principal of the house." *Counden v. Clarke*, Hob. 33.

This will be the case where the word is used as a quasi-word of limitation, where, for instance, after a devise to a person, there is a direction that the property is to remain in his family. *Chapman's Case*, Dyer, 333; *Doe d. Chattaway v. Smith*, 5 Mau. & S. 126; *Griffiths v. Evan*, 5 B. 241.

A devise to A. and his family according to seniority, gives A. an estate tail. *Lucas v. Goldsmid*, 29 B. 657.

So, too, a devise of land to A. for life "in confidence that after her decease she will devise the property to my family," goes to the testator's heir-at-law upon A.'s death. *Wright v. Atkyns*, 17 Ves. 255; 19 Ves. 299.

**Direction to secure for family.**

Under a direction to secure property for the benefit of a person and his family the realty will be settled for life with successive remainders in tail, and the personalty will be settled for life with remainder to the children. *White v. Briggs*, 15 Sim. 17; 2 Ph. 583; *Woolmore v. Burrowes*, 1 Sim. 512.

**Bequest of personalty to family.**

2. It is now settled that in a bequest of personalty or a mixed bequest of realty and personalty to the family of a person, the primary meaning of family is children. *Barnes v. Patch*, 8 Ves. 604; *Terry's Will*, 19 B. 580; *Wood v. Wood*, 3 Ha. 65;

*Parkinson's Trust*, 1 Sim. N. S. 242; *Beales v. Crisford*, 13 Chap. XXIV. Sim. 592; *Burt v. Hillyar*, 14 Eq. 160; *Pigg v. Clarke*, 3 Ch. D. 672; *In re Hutchinson & Tenant*, 8 Ch. D. 540; *In re Mulqueen*, 7 L. R. Ir. 127; see *Woods v. Woods*, 1 M. & Cr. 401.

It has been held that the word includes an illegitimate son. *Lambe v. Eames*, 10 Eq. 267; 6 Ch. 597; *Humble v. Bowman*, 47 L. J. Ch. 62.

3. In order to give the word a different meaning there must be some special circumstances.

a. Thus, if there are no children, next of kin may take. *Re* May mean next of kin. *Muxton*, 4 Jur. N. S. 407.

b. So a gift to the family of an unmarried person would probably extend to all her relatives. *Snow v. Teed*, 9 Eq. 622.

c. In some cases on the context family has been held to mean In the widest sense it may include a husband or wife. those of a man's household, thus including a wife or husband. *Macleroth v. Bacon*, 5 Ves. 158; *Blackwall v. Bull*, 1 Kee. 176.

d. Family has been held to include all descendants in existence at the period of distribution; but such a construction would When it includes all descendants. not be adopted without a strong context. *Williams v. Williams*, 1 Sim. N. S. 358.

e. It would seem that a power to appoint to a person's family Power to appoint to family. would be limited to his children if there are any. *In re Hutchinson & Tenant*, 8 Ch. D. 540; see *Sinnott v. Walsh*, 5 L. R. Ir. 27.

If there are no children the donee of the power may select relations not within the degree of next-of-kin. *Grant v. Lynam*, 4 Russ. 292.

If the power is not exercised the statutory next-of-kin are entitled. *Cruwys v. Colman*, 9 Ves. 319.

4. Where it is clear that the testator has used the word family in a wider sense than any of those here mentioned, but it is uncertain who were meant to be included, the gift will be void for uncertainty. *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; see *Robinson v. Waddelow*, 8 Sim. 134.

When family is construed children, a simple gift to the Whether a

**Chap. XXIV.** families of A. and B. goes *per capita* in joint tenancy. *Gregory v. Smith*, 9 Ha. 708.

gift to several families goes *per capita* or *per stirpes* among them. So, too, a gift to be divided between the families of A. and B. goes to all the children of A. and B. *per capita* as tenants in common. *Barnes v. Patch*, 8 Ves. 604; see, however, *Alexander v. Douglas*, Rom. Notes of Cases, 93.

**Friends.** Under a direction that after the death of the testator's wife, to whom a life interest in lands was given, the lands should revert to the testator's friends, the heir at law was held entitled. *Coogan v. Hayden*, 4 L. R. Ir. 585.

## CHAPTER XXV.

GIFTS TO HEIRS, NEXT OF KIN, REPRESENTATIVES, AND  
EXECUTORS.

WHERE Borough English or gavelkind lands are devised with other lands to the testator's heir, the common law heir is entitled. *Davis v. Kirk*, 2 K. & J. 391; *Thorp v. Owen*, 2 Sm. & G. 90; *Buchanan v. Harrison*, 1 J. & H. 662; *Sladen v. Sladen*, 2 J. & H. 369. Chap. XXV.  
Devise of  
Borough  
English and  
Gavelkinds  
to the heir.

So where Borough English lands alone are devised to a person for life, with remainder to her sons and daughters and their heirs, and if A. dies without having such heirs, to the testator's sons and daughters then living and the heirs of those who may be deceased, the common law heir takes under the ultimate gift. *Polley v. Polley*, 31 B. 363.

In the same way a devise of gavelkind lands alone to the testator's right heirs goes to the common law heir. *Garland v. Beverley*, 9 Ch. D. 213.

The rule is that "*nemo est hæres viventis*," and therefore a devise to the heirs of a living person is contingent, unless the term heirs is so qualified by express words or by the general intention of the will as to show that the testator meant by heir the heir apparent or presumptive or some other person, who will then take as *persona designata*. In what cases  
the word heir  
refers to a  
*persona*  
*designata*.

This will be the case if the testator speaks of the heirs of the body of B. now living. *Burchett v. Durdant*, 2 Vent. 311; Carth. 154; see *Chambers v. Taylor*, 2 M. & Cr. 376.

Or the intention of the testator to use the term as designating a person may be gathered from the whole will; if, for instance, the so-called heir is directed to pay annuities to certain persons

**Chap. XXV.** during whose life he cannot be strictly heir. *Darbishon d. Long v. Beaumont*, 1 P. Wms. 229; 3 B. P. C. 60; *Goodright v. White*, 2 W. Bl. 1010; *Winter v. Perratt*, 9 Cl. & F. 606.

A devise to the heirs and assigns of "A., as if she had continued sole and unmarried," is a gift to the person filling the character as *persona designata*. *Brookman v. Smith*, L. R. 6 Ex. 291; *ib.* 7 Ex. 271; *Dormer v. Phillips*, 4 D. M. & G. 855; 3 Dr. 39; *Fearne*, C. R. 209—212.

Acknowledgment of a person as heir.

The appointment or acknowledgment of a person as heir, though he may not be the real heir, is sufficient to carry to him the testator's real estate. *Parker v. Nickson*, 1 D. J. & S. 177; 11 W. R. 533; 32 L. J. Ch. 397.

Devise to the heir of a particular name or to heirs male.

A devise to the right heirs male, or to the right heirs of a particular name, will go only to the very heir, who must be a male or of that name. *Ashenhurst's Case*, Hob. 34; *cit. Countden v. Clarke*, Moore, 860, pl. 1181; Hob. 29; *Wrightson v. Macaulay*, 14 M. & W. 214; *Thorpe v. Thorpe*, 32 L. J. Ex. 79; see Co. Lit. 24b, note by Hargrave.

If the devise is to the right heirs exclusive of A., who is the right heir, the devise fails. *Goodtitle d. Bailey v. Pugh*, *Fearne*, Cont. Rem. 573; 2 Mer. 348.

Heirs of the body.

The rule does not, however, apply to heirs of the body, whether taking by descent or purchase. *Wells v. Palmer*, 5 Burr. 2617; 2 W. Bl. 687; *Evans d. Weston v. Burtenshaw*, Co. Lit. 164a, n. (2).

Whether the heir male taking by purchase must trace his descent through males.

An heir male taking by inheritance must trace his descent entirely through males. Co. Lit. 25a.

It is said by Jarman, ii. p. 68, that this does not apply to a gift to the heir male or female by purchase, citing Hob. 31; Co. Lit. 25b. At any rate it is clear that if the word lineal be added the heir must trace his descent through males. *Odlie v. Woodford*, 3 M. & Cr. 584; *Bernal v. Bernal*, 3 M. & Cr. 559; and see *Doe d. Angell v. Angell*, 3 Q. B. 328; *Thellusson v. Rendlesham*, 7 H. L. 429.

It appears, however, to be concluded by authority that, even in the absence of the word lineal, the heir male taking by purchase must claim through males. *Lywood v. Kimber*, 29 B. 38.

See *per* Lord St. Leonards, 7 H. L. 512; and see *Doe d. Winter* Chap. XXV.  
v. *Perratt*, 3 M. & Sc. 594.

Under a devise to the heir *ex parte maternâ* a person who is <sup>Heir *ex parte*  
maternâ.</sup> also heir *ex parte paternâ* may take. *Rawlinson v. Wass*, 9  
Ha. 673; *In re Willomier's Trusts*, 16 Ir. Ch. 389.

RULE IN MANDEVILLE'S CASE, CO. LIT. 26B.; FEARNE, 80.

"Where an estate is limited to the heirs special of a parti- <sup>Rule in  
Mandeville's  
case.</sup> cular ancestor, without any estate of freehold limited to the ancestor (either expressly or by implication), it is impossible to effectuate the expressed will of the donor and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail, which had originally vested in and descended from the ancestor himself, and yet the first taker must take as purchaser, because no estate did in fact vest in or descend from the ancestor." *Vernon v. Wright*, 2 Drew. 439; 7 H. L. 35.

The result is the creation of a *quasi* entail, partaking of the opposite qualities of purchase and descent. Thus, where the limitation was to Roberge and the heirs of the body of her late husband John de Mandeville by her, where John de Mandeville had left a son and daughter, it was held that the daughter took on the death of the son *per formam doni*, as the person, who would have been entitled, if the estate had descended from the ancestor. *Mandeville's Case*, Co. Lit. 26b.

The rule in Mandeville's case applies equally where the limitation is to the heirs of the body of the testator. *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160.

It has been adopted were the term issue was used. *Whitelock v. Heddon*, 1 B. & P. 243.

But it will not be extended to a devise to the heirs of the body of a deceased person, excluding certain lines of descent, which would comprehend the real heirs of the body; nor does it apply to a devise to the right heirs male of a person, though a devise to A. and his heirs male gives A. an estate tail. *Allgood v. Blake*, *supra*; *Ashenhurst's Case*, Hob. 34; *Baker v. Wall*, 1 Ld. Raym. 185; *Doe d. Lindsey v. Colyear*, 11 East, 548.

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In what cases  
heirs of the  
body means  
children.

Heirs of the body, however, used as a term of purchase, may mean children if the devise is to them as their parent shall appoint, or if they are to take equally among them as tenants in common: *Jordan v. Adams*, 9 C. B. N. S. 483; *Right v. Creber*, 5 B. & Cr. 866; in which case the estate of the ancestor being equitable did not coalesce with the limitation to the heirs.

## ASSIGNS.

## Assigns.

As a rule the words "and assigns," following the word heirs, have no operation, "they have no conveyancing virtue at all, but are merely declaratory of that power of alienation which the purchaser would have had without them." Wms. R. P. 141; *Brookman v. Smith*, L. R. 6 Ex. 291.

It has, however, been held that a legal limitation to the heirs and assigns of a person, who had a prior equitable life estate, gave that person a general power of appointment over the property. *Quested v. Michell*, 24 L. J. Ch. 722. See, too, *Tapner v. Marlott*, Willes, 177; and *A.-G. v. Vigor*, 8 Ves. 256, 291; but it is unlikely that this construction will be extended.

The effect, however, of a gift to A. or his heirs or assigns, is to give the absolute interest to A. *Wilton's Estate*, 8 D. M. & G. 173; *Hopkins' Trust*, 2 H. & M. 411. See *post*, p. 268.

## BEQUESTS OF PERSONALTY TO HEIRS.

Bequests of  
personalty to  
heirs.

1. A bequest of personalty to the right heirs, or to the heirs at law, or the next heir of an individual, *primâ facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger. *Mounsey v. Blamire*, 4 Russ. 384; *Hamilton v. Mills*, 29 B. 193; *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *Re Rootes*, 1 Dr. & Sm. 228; *Southgate v. Clinch*, 27 L. J. Ch. 651; 4 Jur. N. S. 428.

The rule applies, *â fortiori*, to a mixed fund. *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *Boydell v. Golightly*, 14 Sim. 327; *Todhunter v. Thompson*, 26 W. R. 883.

2. In the same way, if the gift is to A. for life with remainder to his heirs, the heir, in the strict sense, is entitled. *In bonis* Chap. XXV.  
A. for life,  
remainder to  
heirs. *Dixon*, 4 P. D. 81; *Smith v. Butcher*, 10 Ch. D. 113; disproving *Mounsey v. Blamire*, 4 Russ. 384. The cases of *Evans v. Salt*, 6 B. 266; *Low v. Smith*, 25 L. J. Ch. 503; 2 Jur. N. S. 344; *Re Peppitt's Estate*; *Chester v. Phillips*, 36 L. T. N. S. 500, must be considered overruled, unless they can be supported on the special context in each case.

3. But the word heirs may be controlled by the context, as in *Gamboa's Trust*, 4 K. & J. 757, where a bequest to "the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control," went to the next of kin under the statute; and in *In re Newton's Trusts*, 4 Eq. 171, where the bequest to "the heirs and assigns of my deceased sister" was shown to be quasi substitutional by other limitations to the testator's living brothers and sisters and their heirs and assigns; and see *In re Steevens' Trusts*, 15 Eq. 110, as to which case *quære*. In what cases  
heirs means  
next of kin.

Where the intention is to give A. the absolute interest, the word heirs has been held equivalent to executors and administrators. *Powell v. Boggis*, 35 B. 535, where the gift was to A. for life, then to her heirs as she shall give it by will, and if she dies without a will to her right heirs.

And, where the testator directs a division amongst the several heirs of tenants for life, who are related to each other, so that heirs cannot mean next of kin, heirs will mean children. *Bull v. Comberbach*, 25 B. 540; see *Roberts v. Edwards*, 33 B. 259.

4. In a gift to A. or his heirs, heirs means the persons entitled under the statute. *Vaux v. Henderson*, 1 J. & W. 388; *Gittings v. M'Dermott*, 2 M. & K. 69; *Jacobs v. Jacobs*, 16 B. 557; *Doody v. Higgins*, 9 Ha. App. 32; 2 K. & J. 729; *In re Craven*, 23 B. 333; *Powell v. Boggis*, 35 B. 535; *Parsons v. Parsons*, 8 Eq. 260; *Neilson v. Monro*, 27 W. R. 936; *In re Stannard*; *Stannard v. Burt*, 52 L. J. Ch. 354. Substitutional  
gift to heirs.

If real and personal estate are given together to persons or their heirs, but the realty is not converted, the realty goes to the heir and the personalty to the statutory next of kin;

**Chap. XXV.** *Wingfield v. Wingfield*, 9 Ch. D. 658; *Keay v. Boulton*, 25 Ch. D. 212.

In a bequest to children or their heirs, followed by a gift over if all the children die without issue the word heirs has been held to mean issue. *Speakman v. Speakman*, 8 Ha. 180; and see *Roberts v. Edwards*, 12 W. R. 33.

Heirs of the body.

In a bequest to A. or the heirs of his body, heirs of the body means such of the persons entitled under the statute as may be descendants of A. *Pattenden v. Hobson*, 17 Jur. 406; 22 L. J. Ch. 697.

The statute fixes the proportions as well as the persons.

A widow is included in the persons entitled under the statute, and the statute fixes not only the persons but the proportions in which they take. *In re Steevens' Trusts*, 15 Eq. 110; *Jacobs v. Jacobs*, *supra*; *Doody v. Higgins*, *supra*.

A bequest of personalty to "the heirs or next of kin of A." has been construed as a gift to next of kin. *In re Thompson's Trusts*, 9 Ch. D. 607; see p. 260.

## NEXT OF KIN.

Gifts to next of kin.

The words next of kin, without more, mean the nearest blood relations of the propositus in an ascending and descending line, and they take as joint tenants. *Withy v. Mangles*, 10 Cl. & F. 215; *Lucas v. Brandreth*, 28 B. 274; *Avison v. Simpson*, Johns. 43; *Halton v. Foster*, L. R. 3 Ch. 505.

The same meaning has been given to the words "legal or next of kin." *Harris v. Newton*, 46 L. J. Ch. 268; 25 W. R. 228.

Those of the half blood are equally entitled with those of the whole blood. *Collingwood v. Pace*, 1 Vent. 424; *Brown v. Wood*, Alleyn, 36; *Brigg v. Brigg*, 33 W. R. 454; see Williams on Executors, 1120.

Gift under power.

But a selective power to appoint to next of kin will authorise an appointment to statutory next of kin. *Snow v. Teed*, 9 Eq. 622.

Next of kin *ex parte maternâ*.

Under a gift to next of kin *ex parte maternâ*, next of kin *ex parte paternâ*, who happen to be also next of kin *ex parte maternâ*, will not be excluded, except by express words.

*Gundry v. Pinniger*, 14 B. 94; 1 D. M. & G. 502; *Say v. Creed*, 5 Ha. 580. Chap. XXV.

If there is an express reference to the statute or intestacy, all kindred entitled under the statute, including those who take by representation under the statute, will come in. *Bullock v. Downes*, 9 H. L. 1; *Nichols v. Haviland*, 1 K. & J. 504. The effect of a reference to the statute or intestacy.

Neither the wife nor the husband take as *next of kin* under the statute. *Garrick v. Lord Camden*, 14 Ves. 372; *Kilner v. Leech*, 10 B. 362.

And a gift to persons, entitled as next of kin or otherwise under the statute, will not include the husband. *Milne v. Gilbert*, 2 D. M. & G. 715; 5 D. M. & G. 510.

If a husband has been expressly excluded in a gift to next of kin under the statute, a widow will be admitted under a subsequent gift to next of kin by statute where there is no such exclusion. *In re Collins' Trusts*, W. N. 1877, 87.

If only an intention is declared of leaving property to next of kin according to the statute, which is not carried out, the property goes as in an intestacy, and a widow would therefore be admitted. *Ash v. Ash*, 33 B. 187.

A person is not excluded from taking property under a gift to next of kin by the fact, that a life interest in the property is expressly given to him. *Gorbell v. Davison*, 18 B. 556. What will exclude one of the next of kin from a gift to next of kin.

But if the gift is to the "other the next of kin," one of the next of kin to whom an interest is expressly given by the will will be excluded. *Cooper v. Denison*, 13 Sim. 290.

If there is a reference to the statute, the statute regulates the nature of the interest, as well as the persons, who are to take under it. *Bullock v. Downes*, 9 H. L. 1; *Ranking's Settlement Trusts*, 6 Eq. 601. Whether the statute regulates the nature of the interest as well as the persons to take.

The above proposition seems to be justified by the opinions expressed in *Bullock v. Downes*, and would probably be now adopted. However, the cases go to this:

1. Where there is a reference to intestacy, as well as to the statute, the statute fixes the proportions as well as the persons. *Bullock v. Downes*, *supra*; *Martin v. Glover*, 1 Coll. 270; *Jenkins v. Gower*, 2 Coll. 537.

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2. So, where the gift is to persons "entitled under," or "under and according to" the statute. *Horn v. Coleman*, 1 Sm. & G. 169; *Ranking's Settlement*, *supra*.

3. If the gift is merely to persons according to the statute the better opinion seems to be, that the same result would follow. *Mattison v. Tanfield*, 3 B. 131; *Lewis v. Morris*, 19 B.

34. On the other hand, the contrary was held in *In re Greenwood's Trusts*, 3 Giff. 390.

4. Words importing or directing a tenancy in common will not prevent the statute from fixing the proportions. *Mattison v. Tanfield*, *supra*; *Lewis v. Morris*, *supra*. *Richardson v. Richardson*, 14 Sim. 526, must be considered overruled; see *Bullock v. Downes*.

5. It would seem, that a gift *equally* among the persons entitled under the statute, would prevent the statute from fixing the proportions; see *Phillips v. Garth*, 3 B. C. C. 69.

But if there are words importing that the distribution is to be according to the statute, the word *equally* will be rejected. *Holloway v. Radcliffe*, 23 B. 163; see *Fielden v. Ashworth*, 20 Eq. 410.

Nearest of  
kin by way of  
heirship.

A devise of land to the nearest of kin by way of heirship goes to the heir. *Williams v. Ashton*, 1 J. & H. 115.

A gift to "next of kin or heir at law" would probably go according to the nature of the property. *Lowndes v. Stone*, 4 Ves. 649; see *In re Thompson's Trusts*, 9 Ch. D. 607.

Next of kin  
in the male  
line.

In *Boys v. Bradley*, 10 Ha. 389; 4 D. M. & G. 58; 5 H. L. 873, "next of kin in the male line in preference to the female line," was held to mean next of kin *ex parte paterno*.

A devise of land to the next male kin goes to all the nearest of kin being males living at the testator's death. *In re Chapman*; *Ellick v. Cox*, 32 W. R. 424.

Devise to  
"nearest" of  
a class.

A devise of land to the "next" or "nearest" of a particular class of relations goes to the eldest of the class. *Perriman v. Pearce*, Co. Lit. 10b, n. 2; *Power v. Quealy*, 2 L. R. Ir. 227; 4 *ib.* 20, where the devise was to the "nearest, and most deserving male cousin, and a regular Power of the family."

On the other hand, in a gift of real and personal estate together to the nearest relation of a particular name the word

relation has been held to be *nomen collectivum*, and to include all the relations of the same degree. *Pyot v. Pyot*, 1 Ves. sen. 335; Belt. 169. Chap. XXV.

It appears to be clear that a devise of land to "next of kin of a particular name" goes only to next of kin who are by birth entitled to the name, and that a daughter of that name who at the testator's death has changed her name by marriage would be excluded. *Leigh v. Leigh*, 15 Ves. 100; *Jobson's Case*, Cro. El. 576; see *Bon v. Smith*, Cro. El. 532. Next of kin of a particular name.

But it may appear from the will that the assumption of the name by royal licence is intended to be sufficient; *In re Roberts*; *Repington v. Roberts-Gawen*, 19 Ch. D. 520.

Possibly, in the case of personalty, or of real and personal estate given together, a reference to a particular name may be more readily understood as referring to the stock or family.

At any rate it may be so understood if there is an explanatory context.

Thus, "nearest relation of the name of the Pyots" has been held to refer to the stock of the Pyots, so that change of name by marriage was immaterial. *Pyot v. Pyot*, 1 Ves. sen. 335.

A similar construction was put upon "next of kin of the surname of Crump." *Carpenter v. Bott*, 15 Sim. 606; see, too, *Mortimer v. Hartley*, 6 Ex. 47.

Whether the person, who is to take under the description of a particular name, must satisfy both parts of the description is uncertain: see *Doe v. Plumptre*, 3 B. & Ald. 474, and the remarks of the Vice-Chancellor on that case in *Carpenter v. Bott*, 15 Sim. 606.

A gift to next of kin, to be ascertained at a particular time exclusive of A., who is the sole next of kin, goes to the persons who would have been next of kin if A. also had been dead. *White v. Springett*, 4 Ch. 300. Gift to next of kin exclusive of A., who is sole next of kin.

The persons to take will be ascertained in the same way, if the gift is to next of kin by statute simply exclusive of A., who happens to be sole next of kin by statute. *Re Taylor*; *Taylor v. Ley*, 45 L. T. 210; rev. W. N. 1885, 158.

Under a limitation to the statutory next of kin of B., exclusive

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of A. and his representatives, it was held that the daughters of A., who were among the statutory next of kin of B., as representing A., were excluded. *Lindsay v. Ellicott*, 46 L. J. Ch. 878.

Next of kin explained by the context.

The testator may show, that he meant by next of kin the children of a tenant for life, as, where the gift was to a daughter for life and then to the testatrix's next of kin, to be vested interests from the testatrix's death, "except as to any child afterwards born of the daughter." *Bird v. Wood*, 2 S. & St. 400; see 2 M. & K. 86, 89.

Gift to next of kin of A. as if she had died unmarried.

In a gift to the next of kin of A., or even, to the person entitled under the Statutes of Distribution, as if she had died intestate and unmarried, unmarried will be construed as equivalent to "without leaving a husband," since otherwise children would be excluded. *Day v. Barnard*, 1 Dr. & S. 351; *Sanders' Trusts*, 3 K. & J. 152; *Norman's Trusts*, 3 D. M. & G. 965; *Maugham v. Vincent*, 9 L. J. Ch. 329; *Clarke v. Colls*, 9 H. L. 601.

Where the testator, a widower, expressly excluded a granddaughter from a bequest in favour of his "next of kin as if he had died unmarried," it was held that unmarried meant wifeless. *Curveth v. Heiron*, W. N. 1879, 145.

Without having been married.

In a marriage settlement a limitation in favour of the next of kin of the wife as if she had died "without having been married," when there was a declaration that a named illegitimate daughter should, for the purposes of the trust, be deemed to be a lawful child, has been held to mean as if the wife had died without having been married to her then intended husband. *Wilson v. Atkinson*, 4 D. J. & S. 455.

A similar construction has been adopted, where there was no explanatory context, and the words have even been held to be equivalent to "without leaving a husband." *Upton v. Brown*, 12 Ch. D. 872; *In re Ball's Trusts*, 11 Ch. D. 270.

It seems, however, that such clear words as "without ever having been married" must be construed in their natural sense, unless there is a strong context. *Emmins v. Bradford*, 13 Ch. D. 493; *Hardman v. Maffett*, 13 L. R. Ir. 499.

At what time the next of

The terms next of kin and heirs have a direct reference to

the death of the ancestor, and therefore next of kin and heirs Chap. XXV.  
are to be ascertained at the death of the ancestor; and, where kin are to be ascertained.  
there is in addition a reference to the statute or to intestacy,  
this rule is almost without exception.

The same rules apply to realty, personalty, and to a mixed A mixed fund is no exception to the ordinary rule.  
fund. *Cusack v. Rood*, 24 W. R. 391.

1. Thus the rule applies, whether the bequest to next of kin is immediate or preceded by a life interest or contingent. *Moss v. Dunlop*, Joh. 490; *Bird v. Luckie*, 8 Ha. 301.

2. And, if the gift is to next of kin living at a particular time, it will go to such of the next of kin at the testator's death as are living at that time. *Spink v. Lewis*, 3 B. C. C. 355.

3. If there is a devise to A. for life with remainder to his eldest son for life, with a direction on his death to convey the estate to the heir male of A., the eldest son of A. is entitled on A.'s death to have the fee conveyed to him. *In re Grayson*, 48 L. J. Ch. 354.

Similarly, if personalty is given to A. for life, and then to the testator's next of kin, though A. may be one of the next of kin, or even the only next of kin, at the testator's death, or even the only next of kin at the date of the will as well as at the testator's death, the class will nevertheless be ascertained at the testator's death. *Doe v. Lawson*, 3 East. 278; *Ware v. Rowland*, 2 Ph. 635; *Holloway v. Holloway*, 5 Ves. 399; *Barker's Trust*, 1 Sm. & G. 118; *Gorbell v. Davison*, 18 B. 556; *Starr v. Newberry*, 23 B. 436.

The mere exception from the class of next of kin of certain persons, who could only be members of the class on the supposition of the death of the tenant for life, will not alter the time for fixing the class. *Lee v. Lee*, 1 Dr. & Sm. 85; see *Cooper v. Denison*, 13 Sim. 290.

4. Where, however, the gift is to the next of kin of a deceased person, and the tenant for life is the sole next of kin at the date Next of kin of deceased person.  
of the will, so that the class cannot be increased if the tenant for life survives the testator, there is a stronger argument against ascertaining the next of kin at the testator's death; but probably this circumstance would not alone be sufficient to oust the rule. *Wharton v. Barker*, 4 K. & J. 483.

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Executory  
gift to next of  
kin.

5. The same rules apply, where the gift to the next of kin is not by way of remainder, but by way of executory limitation.

Thus, in a gift to A. for life, where A. is sole next of kin at the date of the will and death, and then to her children, or to A. absolutely, and if she dies without children, or under twenty-one, to the testator's next of kin, the next of kin are ascertained at the testator's death. *Lang's Will*, 9 W. R. 589; *Murphy v. Donegan*, 3 J. & Lat. 534; *Baker v. Gibson*, 12 B. 101; *Harrison v. Harrison*, 28 B. 21; *Michell v. Bridges*, 13 W. R. 200; see *Urquhart v. Urquhart*, 13 Sim. 613; *Minter v. Wraith*, 14 Sim. 549; *Hunter v. Tedlie*, 7 L. R. Ir. 448.

The case is, however, different, if the gift is not to next of kin, but to the "nearest of kin of my own family," or to relations. *Clapton v. Bulmer*, 5 M. & Cr. 108; see pp. 248, 249.

In the former case the intention is to let the property go as the law would give it, in the latter to make a complete disposition by the will to a particular class contemplated by the testator, though, owing to the vagueness of the description, the Courts may be compelled to have recourse to the statute, that the gift may not be void for uncertainty.

6. Even if the gift be to a class of persons, who must be the testator's next of kin, if any survive him, and if they die without issue to his next of kin, the next of kin are ascertained at his death. *Seifferth v. Badham*, 9 B. 372.

7. The testator may of course direct the class of next of kin to be ascertained at any time or in any manner he chooses. *Pinder v. Pinder*, 28 B. 44; *White v. Springett*, 4 Ch. 300.

Effect of  
words of  
futurity in  
ascertaining  
the class.

The mere use of words of futurity will not alter the ordinary rule; for instance, if the bequest be to A. for life and after his death for such persons, as shall be my next of kin. *Holloway v. Holloway*, 5 Ves. 399; *Doe v. Lawson*, 3 East, 278; *Rayner v. Mowbray*, 3 B. C. C. 234.

But, if the gift is, after the decease of the tenant for life, to such persons as shall *then* be my next of kin, the word "*then*" must refer to the death of tenant for life. *Long v. Blackall*, 3 Ves. 486; *Wharton v. Barker*, 4 K. & J. 483; see *Clowes v. Hilliard*, 4 Ch. D. 413; *In re Morley's Trusts*, 25 W. R. 825; and in such a case the class is to be ascertained as if the testator

had lived up to and died at the time referred to. *Sturge v. Great Western Railway Co.*, 19 Ch. D. 444. Chap. XXV.

But it must be clear, that the word "then" is used temporally and not as equivalent to thereupon, and that it may not be referred to other words pointing to the testator's death, as will be the case if the gift is, for instance, "to such persons as would by virtue of the statutes for the distribution of intestates' estates have become and been then entitled thereto in case I had died intestate." *Bullock v. Downes*, 9 H. L. 1; *Doe v. Lawson*, 3 East, 278; *Cable v. Cable*, 16 B. 507; *Wheeler v. Adams*, 17 B. 417; *Fletcher v. Fletcher*, 3 D. F. & J. 775; *Day v. Day*, I. R. 4 Eq. 385; *Mortimore v. Mortimore*, 4 App. C. 448.

Where the gift is to next of kin of a person dead at the date of the will, the class is ascertained at the testator's death. *Phillips v. Evans*, 4 De G. & Sm. 188. Gifts to next of kin of a deceased person.

And the rule would be the same if the person, whose next of kin are the legatees, is not dead at the date of the will, but dies in the testator's lifetime. *Vaux v. Henderson*, 1 J. & W. 388; *Gryll's Trusts*, 6 Eq. 589.

But this rule gives way to an intention that the next of kin of the deceased person are to be ascertained at his death. *Ham's Trust*, 2 Sim. N. S. 106; 15 Jur. 1121.

And, if the gift is to the next of kin of a person, who survives the testator, the class is ascertained at the death of that person. *Gundry v. Pinniger*, 1 De G. M. & G. 502; *Jacobs v. Jacobs*, 16 B. 557; *Markham v. Ivatt*, 20 B. 579. Next of kin of a living person.

## REPRESENTATIVES.

The words representatives, legal representatives, personal representatives, or legal personal representatives, must, in the absence of other controlling words, be taken to mean persons claiming as executors or administrators. *Crawford's Trust*, 2 Dr. 230; *Hinchcliffe v. Westwood*, 2 De G. & Sm. 216; *Dixon v. Dixon*, 24 B. 129; *Re Turner*, 2 Dr. & Sm. 501; *Smith v. Barneby*, 2 Coll. 728; *Wyndham's Trust*, L. R. 1 Eq. 290; *Alger v. Parrott*, 3 Eq. 328; *Best's Settlement*, 18 Eq. 686. Gift to representatives.

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In what cases  
representa-  
tives mean  
next of kin.

If, however, there is an indication of intention that the representatives are to take beneficially and not in any fiduciary capacity, the words can hardly be referred to executors or administrators, and they will generally mean statutory next of kin, including a widow, but not a husband. *Cotton v. Cotton*, 2 B. 67; *Smith v. Palmer*, 7 Ha. 225; *Holloway v. Radcliffe*, 23 B. 163; *King v. Cleveland*, 26 B. 166; 4 De G. & J. 477.

It would seem that by analogy to the case of heirs the statute would fix the proportions as well as the persons, and that *Walker v. Marquis of Camden*, 16 Sim. 329, would not now be followed.

Substitutional  
gift.

1. If the gift is substitutional, as, for instance, to A. or his legal representatives, or even to A., and if he dies before me to his representatives, there is an *a priori* improbability, that the testator meant to benefit the estate of the legatee if he died in his own lifetime, while the legatee himself could derive no benefit from the legacy unless he survived the testator, and therefore representatives will be read as equivalent to statutory next of kin. *Bridge v. Abbott*, 3 B. C. C. 224; *Cotton v. Cotton*, 2 B. 67; see *Hewetson v. Todhunter*, 22 L. J. Ch. 76.

And if the gift is to several related persons, or their respective representatives, representatives will mean descendants. *Styth v. Monro*, 6 Sim. 49. See *Horsepool v. Watson*, 3 Ves. 383; *Atherton v. Crowther*, 19 B. 448; *In re Booth*; *Fytton v. Booth*, W. N. 1877, 129.

Prior life  
estate.

2. Where there is a prior life estate the reasons for construing "legal representatives" as next of kin do not apply.

The substitutional words may be considered as inserted merely *ex abundanti cautela*, to provide for the death of the legatee in the lifetime of the tenant for life. *In re Crawford*, 2 Dr. 230, 242; *Re Henderson*, 28 B. 656; *Hinchcliffe v. Westwood*, 2 De G. & S. 216; *Chapman v. Chapman*, 33 B. 556; *Re Turner*, 2 Dr. & Sm. 501.

The same is the case where there is a direct gift to A. or his personal representatives, but the time of payment is postponed, or a gift to A., and if he dies before the whole is expended, to his representatives. *Thompson v. Whitelock*, 4 De G. & J. 490; *Dixon v. Dixon*, 24 B. 129.

3. If there are words of distribution, such as "to and amongst," or "share and share alike," and similar expressions, showing that the "representatives" are to take beneficially, the legacy will go to the statutory next of kin. *King v. Cleveland*, 4 De G. & J. 477; *Baines v. Ottey*, 1 M. & K. 465; *Smith v. Palmer*, 7 Ha. 225. Chap. XXV.  
Words of  
distribution.

This, however, does not apply where the gift being to the representatives of several persons who take life interests, the words of distribution can be referred to the *stirpes*. *Wing v. Wing*, 24 W. R. 878.

4. If the words executors and administrators have been used in other parts of the will, this is an argument to show, that representatives must mean something else. *Jennings v. Gallimore*, 3 Ves. 146; *King v. Cleveland*, 4 De G. & J. 477; *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Marquis of Camden*, 16 Sim. 329; *Briggs v. Upton*, 7 Ch. 376. Where both  
the words  
executors and  
representa-  
tives occur.

5. Where there is a direction to pay to personal representatives, the fact that an executor is appointed, would be a strong argument in favour of next of kin. *Robinson v. Smith*, 6 Sim. 47; *Walter v. Makin*, 6 Sim. 148; *Jennings v. Gallimore*, 3 Ves. 146. See *Briggs v. Upton*, *supra*. Direction to  
pay to repre-  
sentatives  
where an  
executor is  
appointed.

6. The same result will follow, if there are words added to the term "representatives" inconsistent with the meaning "executors or administrators," such as "personal representatives or next of kin" (a); or, "such persons as would be the personal representatives of my daughter in case she had died unmarried" (b); or, "legal personal representatives at the time of her death" (c); or, "next legal or personal representatives" (d). *Phillips v. Evans*, 4 De G. & Sm. 188 (a). *Gryll's Trust*, 6 Eq. 589 (b). *Robinson v. Evans*, 22 W. R. 199; 43 L. J. Ch. 82; *Long v. Blackall*, 3 Ves. 486 (c). *Booth v. Vicars*, 1 Coll. 6; *Stockdale v. Nicholson*, 4 Eq. 359 (d). Where the  
term represen-  
tatives is  
coupled with  
explanatory  
words.

Whether, in this latter case, the next of kin proper or the statutory next of kin take, see *Booth v. Vicars*, *supra*; *Stockdale v. Nicholson*, *supra*.

A gift to personal representatives *per stirpes*, and not *per capita*, has been held to mean descendants. *Atherton v. Crowther*, 19 B. 448.

**Chap. XXV.** For a direction to pay to "legal representatives according to the course of administration," see *Jennings v. Gallimore*, 3 Ves. 146; *Briggs v. Upton*, 7 Ch. 376.

Effect of the word assigns.

It would seem, that the addition of the word assigns in a substitutional gift to heirs or representatives would make it impossible to construe these words as equivalent to next of kin. *Grafftey v. Humpage*, 1 B. 46; *Waite v. Templer*, 2 Sim. 524.

### EXECUTORS.

Gift to A. and in case of his death to his executors.

A gift to A., and in case of his death to his executors or administrators, will go to A.'s executors in the event of his death before the testator. *Long v. Watkinson*, 17 B. 471; *Re Seymour's Trusts*, Johns. 472; *Maxwell v. Maxwell*, 1 R. 2 Eq. 478; *In re Clay*; *Clay v. Clay*, 32 W. R. 516; affd. 54 L. J. Ch. 648; overruling *Palin v. Hills*, 1 M. & K. 470. See, too, *Aspinall v. Duckworth*, 35 B. 307; *Re Morgan's Trusts*, 2 W. R. 439.

Of course where there is a future gift to A. or his executors the word executors will be treated as inserted to provide for the death of the donee before the time of vesting in possession. See *Stocks v. Dodsley*, 1 Kee. 325.

Executors taking substitutionally take trust for the next of kin.

It appears to be now settled, notwithstanding *Evans v. Charles*, 1 Anstr. 128, that executors taking substitutionally take the property to be administered as part of the assets of the original legatee. *Stocks v. Dodsley*, 1 Kee. 325; *Leake v. Macdowell*, 33 B. 238.

Similarly, a gift to the executors of a dead person is a gift to his legal personal representatives as part of his estate. *Trethewy v. Helyar*, 4 Ch. D. 53.

Gifts to the testator's executors only go to them if they accept the office.

A general or specific legacy given by a testator to his executors, whether under the title of executors or not, is *prima facie* given to them in that character, and therefore they are not entitled to the legacies if they decline or are incapable of undertaking the office. *Reed v. Devaynes*, 2 Cox, 285; 3 B. C. C. 95; *Calvert v. Sibbon*, 4 B. 222; *Hanbury v. Spooner*, 5 B. 630; *Hawkins' Trust*, 33 B. 570; *Piggott v. Green*, 6 Sim. 72; *Slaney v. Watney*, L. R. 2 Eq. 418; *In re Appleton*; *Barber v. Tebbit*, W. N. 1885, 109.

To entitle an executor to receive his legacy, it is sufficient, if **Chap. XXV.** he either proves the will, which he may do at any time before the estate is fully administered, or if he acts as executor. *Hollingsworth v. Grassett*, 15 Sim. 52; *Angermann v. Ford*, 29 B. 349; *Harrison v. Rowley*, 4 Ves. 212; *Lewis v. Matthews*, 8 Eq. 277.

What is a sufficient acceptance of the office.

And it seems, that if the legacy is directed to be paid within twelve months, and there is nothing to show that the executor refuses to act, he is entitled to his legacy if he survives the twelve months. *Brydges v. Wotton*, 1 V. & B. 134.

But if the executor acts fraudulently, the mere taking out probate will not entitle him to his legacy. *Harford v. Browning*, 1 Cox, 302.

The presumption that a legacy to an executor is given to him in that character for his trouble, is not rebutted by the fact that the legacy preceeds the appointment of executors or by the fact that legacies of unequal amount are given to the executors. *In re Appleton*; *Barber v. Tebbit*, 29 Ch. D. 893; see *Wildes v. Davies*, 1 Sm. & G. 475; 22 L. J. Ch. 497.

In what cases the executor is entitled though he does not act.

The presumption would probably not now be held to be rebutted by difference in the subject-matter of two bequests to executors. *In re Appleton, supra*, where *Jewis v. Lawrence*, 8 Eq. 345, is discussed.

The presumption may be rebutted:

1. If some other motive is expressed, as if the gift is to "my friend and executor." *Re Denby*, 3 D. F. & J. 350; *Dix v. Reed*, 1 S. & St. 237; *Cockerell v. Barber*, 2 Russ. 585; *Burgess v. Burgess*, 1 Coll. 367; *Bubb v. Yelverton*, 13 Eq. 131.

2. If the gift is after a life interest. *In re Reeve's Trusts*, 4 Ch. D. 841.

3. If there is a direction that in the event of the executor's death before the testator, his legacy is to go to his next of kin. *In re Bunbury's Trusts*, 1 R. 10 Eq. 408.

4. The presumption does not arise if the gift is of residue. *Parsons v. Saffery*, 9 Pr. 578; *Griffith v. Pruett*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264.

Whether a gift of residue to executors is a gift to them for their own benefit, or whether they take in trust for the next of **Whether a gift of residue to executors**

**Chap. XXV.** kin, depends on the general scheme of the will, and is not affected by the statute 1 Will, IV. c. 40. *Williams v. Arkle, infra.* is beneficial or in trust.

Thus the following circumstances are in favour of the executors taking beneficially:—

If the gift is not to the executors as such, but by name. *Williams v. Arkle*, L. R. 7 H. L. 606; *Re Henshaw*, 12 W. R. 1139; 34 L. J. Ch. 98; *Hillersden v. Grove*, 21 B. 518.

If the gift is subject to certain payments. *Parsons v. Saffery*, 9 Pr. 578.

On the other hand, the fact that prior legacies have been given to them, or that the bequest is to them as joint tenants, is against their right to the beneficial interest, though not alone conclusive. *Gibbs v. Rumsey*, 2 V. & B. 294; *Re Henshaw, supra*; *Saltmarsh v. Barrett*, 3 D. F. & J. 279; see *Buckle v. Bristow*, 13 W. R. 68.

And a direction that the executors are to retain their costs would, it seems, show that they were not to take beneficially. *Saltmarsh v. Barrett, supra.*

But a reimbursement clause, where there are continuing trusts, will not have this effect. *Romans v. Mitchell*, 15 W. R. 552.

So where there is no gift to the executors, a direction that they, their heirs, successors, representatives, or descendants may apply and distribute the same as to them may appear just, makes them trustees for the next of kin. *Neo v. Neo*, L. R. 6 P. C. 381; see *Barrs v. Fewkes*, 12 W. R. 666; 13 *ib.* 987; *Caruth v. Parker*, 11 L. R. Ir. 19.

## CHAPTER XXVI.

## GIFTS TO CHARITABLE USES.

## I. WHAT ARE CHARITABLE GIFTS.

CHARITY, in the legal sense, does not necessarily imply relief of the poor. The stat. 43 Eliz. c. 4, defines various kinds of charities. But generally it may be said every gift for a public purpose, local or general, is charitable. See cases cited in the note to *Loscombe v. Wintringham*, 13 B. 87. Chap. XXVI.  
Instances of  
charitable  
gifts.

Thus gifts for the advancement of education and learning in every part of the world; for the glory of God in the spiritual welfare of His creatures; for the advancement of Great Britain; to any religious institution or purposes; or for charities and other public purposes in a certain parish, are charitable. *Whicker v. Hume*, 7 H. L. 124; *Townshend v. Carus*, 3 Ha. 257; *Powerscourt v. Powerscourt*, 1 Moll. 616; *Nightingale v. Goulbourne*, 5 Ha. 484; 2 Ph. 594; *Wilkinson v. Lindgren*, 5 Ch. 570; *Dolan v. Mazdermot*, 3 Ch. 676.

So, too, gifts for any educational or religious purpose, not contrary to morality or the law, are charitable. *Thornton v. Howe*, 31 B. 14; *Beaumont v. Oliveira*, 4 Ch. 309.

For the construction of a gift to the hospitals of London, see *Wallace v. A.-G.*, 33 B. 384.

A bequest for objects of liberality or benevolence, or for "purposes of general utility," or "for hospitality and charity," is not charitable. *Morice v. Bp. of Durham*, 9 Ves. 399; 10 Ves. 521; *James v. Allan*, 3 Mer. 17; *Kendall v. Granger*, 5 B. 300; see *In re Jarman's Estate*; *Leavers v. Clayton*, 8 Ch. D. 584; *Re Hewitt*; *Mayor of Gateshead v. Hudspeth*, 49 L. T. 587. Bequest for  
purposes of  
liberality or  
benevolence  
is not charit-  
able.

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Private  
charity.

And a bequest for private charity is void. *Ommaney v. Butcher*, T. & R. 260; see, however, *In re Sinclair's Trust*, 13 L. R. Ir. 150.

A gift for missionary purposes is void for uncertainty. *Scott v. Brownrigg*, 9 L. R. Ir. 246.

What is a  
charitable  
society.

A bequest to a voluntary society existing for charitable purposes is charitable. *Cocks v. Mannors*, 12 Eq. 574.

Voluntary  
association  
existing for  
private  
purposes of  
its members  
is not charit-  
able.

But a gift to a similar society for the use and benefit of the society is not charitable, the object being not to benefit the charitable objects of the community, but the members of it themselves. *Stewart v. Green*, I. R. 5 Eq. 470; see *Mahony v. Duggan*, 11 L. R. Ir. 260.

A gift to a voluntary society existing merely for purposes of religious intercourse and edification of its members is not charitable. *Cocks v. Mannors*, *supra*.

In such a case the individual members of the society may be entitled to the property if the gift is so framed as to indicate an intention to benefit them. *In re Delany's Estate*, 9 L. R. Ir. 226.

But to enable the members to take, the gift must be to the members and not to the society as such. *Morrow v. M'Conville*, 11 L. R. Ir. 236; see *Hogan v. Byrne*, 13 Ir. Ch. 166.

A gift to a society existing merely for the mutual benefit of its members is not charitable. *In re Clark's Trust*, 1 Ch. D. 497; *Thompson v. Shakespear*, Jo. 612; 1 D. F. & J. 399; *Carne v. Long*, 2 D. F. & J. 75; *Re Dutton*, 4 Ex. D. 54.

Benefit of  
parish.

A gift for the use and benefit of a parish is charitable. *A.-G. v. Lord Hotham*, T. & R. 209; *A.-G. v. Webster*, 20 Eq. 483.

Gift to build  
or repair a  
tomb is not  
a charity.

A gift to build or repair the tomb of the testator or his family, not within a church, is not charitable. *Mellick v. President of the Asylum*, Jac. 180; *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Adnam v. Cole*, 6 B. 353; *Rickard v. Robson*, 31 B. 244; *Hoare v. Osborne*, L. R. 1 Eq. 585.

Nor is such a gift within the statute 43 Geo. III. c. 108. *Re Rigley's Trust*, 15 W. R. 190; 36 L. J. Ch. 147.

Such a gift, therefore, if it involves a perpetuity, is void. *Rickard v. Robson*, *supra*; *Yeap Cheah Neo v. Ong Ching Neo*, L. R. 6 P. C. 381.

But bequests to repair the fabric of the church, or even the ornaments within it, such as a monument or tomb, are charitable. *Hoare v. Osborne*, L. R. 1 Eq. 585. Chap. XXVI.  
Gift to repair  
the fabric of  
a church.

Dissenters and Roman Catholics are, as regards bequests for charitable purposes, on the same footing as the Established Church. 1 W. & M. c. 18; 2 & 3 Will. IV. c. 115, s. 1; *A.-G. v. Pearson*, 3 Mer. 353, 405. Position of  
Dissenters  
and Roman  
Catholics.

Thus bequests for the maintenance of Protestant Dissenters, or for the assistance of Unitarian congregations, or for the benefit of Irvingites, are valid. *A.-G. v. Pearson*, 3 Mer. 353; *Shrewsbury v. Hornby*, 5 Ha. 406; *A.-G. v. Lawes*, 8 Ha. 32. Dissenters.

So bequests to be applied to the use of Roman Catholic schools, or of a Roman Catholic college existing for the education of ecclesiastics and laymen, or to promote the Roman Catholic religion, or to assist in the completion of a Roman Catholic cathedral, are good. *Bradshaw v. Tasker*, 2 M. & K. 221; *Walsh v. Gladstone*, 1 Ph. 290; *West v. Shuttleworth*, 2 M. & K. 684; *Dillon v. Reilly*, I. R. 10 Eq. 152. Roman  
Catholics.

By 9 & 10 Vict. c. 59, s. 2, Jews are, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, subject to the same laws as Protestant subjects dissenting from the Church of England.

Since this statute bequests to enable persons professing the Jewish religion to observe its rights are valid. *Straus v. Goldsmid*, 8 Sim. 614; *In re Michel's Trusts*, 28 B. 39.

It has been held in Ireland that bequests in favour of Jesuits and members of other religious orders of the Church of Rome bound by monastic or religious vows are void, as contravening the policy of 10 Geo. IV. c. 7 (see sections 33—36). No doubt the same rule would be applied in England. Monastic  
orders.

Thus bequests to be applied for the education and maintenance of priests of the order of St. Dominick in Ireland, and for the use of the Franciscan Convent at Wexford, have been held to be void. *Sims v. Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43; *Walsh v. Walsh*, I. R. 4 Eq. 396; *Kehoe v. Wilson*, 7 L. R. Ir. 10.

The statute applies whether the monastic body is settled before or since the Act. *Liston v. Keegan*, 9 L. R. Ir. 531.

**Chap. XXVI.**Release of  
poachers.

Upon a similar principle a bequest to purchase the discharge of poachers committed for non-payment of fines, fees, or expenses under the Game Laws was held to be void. *Thrupp v. Collett*, 26 B. 125.

Superstitious  
uses.

The statutes removing religious disabilities have not affected bequests to superstitious uses.

The statute of 1 Edw. VI. c. 14, relates only to certain superstitious uses then existing. The earlier statute, 23 Hen. VIII. c. 10, relates only to assurances of land to churches and chapels. But by analogy to these statutes certain bequests are considered void as being superstitious uses. *Cary v. Abbot*, 7 Ves. 490.

Bequests for  
masses.

Thus bequests to priests for offering masses for the souls of the dead are void, notwithstanding 2 & 3 Will. IV. c. 115, and go to the next of kin. *West v. Shuttleworth*, 2 M. & K. 684; *Heath v. Chapman*, 2 Dr. 417; *Re Blundell's Trusts*, 30 B. 360; *In re Fleetwood*; *Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594.

Land devised for a superstitious use goes to the heir. *R. v. Portington*, 3 Salk. 334; *Crofts v. Evetts*, Moore, 784.

Bequests for  
masses in  
Ireland.

Bequests for offering up masses for the souls of the dead are not illegal in Ireland. *Commissioners of Charitable Donations v. Walsh*, 7 Ir. Eq. 34; *Read v. Hodgins*, *ib.* 17; *Brennan v. Brennan*, 1 R. 2 Eq. 321.

Such bequests, however, though not illegal in Ireland, are not charitable, and are void if they tend to a perpetuity. *Dillon v. Reilly*, 1 R. 10 Eq. 152; *Kehoe v. Wilson*, 7 L. R. Ir. 10; see *A.-G. v. Delaney*, 1 R. 10 C. L. 104; *Morrow v. McConville*, 11 L. R. Ir. 236.

By the Roman Catholic Charities Act, 23 & 24 Vict. c. 134, s. 1, it is in effect provided, that dispositions of real or personal estate upon any lawful charitable trust in favour of Roman Catholics shall not be invalidated by reason that the same estate is subjected to a trust deemed to be superstitious, but the property may be apportioned, and a portion applied to the lawful charitable trusts declared by the donor, and the rest applied to charitable purposes for the benefit of Roman Catholic as the Court or the Charity Commissioners may think just.

As to the application of the doctrine of superstitious uses to Chap. XXVI British Colonies, see *Yeap Cheah Neo v. Ong Ching Neo*, L. R.

6 P. C. 381, and the authorities there quoted.

Gifts for the relief of aged, impotent, and poor people are enumerated as charitable by the statute 43 Eliz. c. 4. See *Nash v. Morley*, 5 B. 177; *Thompson v. Corby*, 27 B. 649.

Gifts for the relief of aged, impotent, and poor people.

But none of these words are necessary to constitute a charitable gift: thus, a gift for the widows and orphans of a parish, or the widows and children of the seamen of Liverpool, is charitable. *A.-G. v. Coombe*, 2 S. & St. 93; *Powell v. A.-G.*, 3 Mer. 48.

A gift in favour of the poor does not include persons receiving parochial relief. *A.-G. v. Price*, 3 Atk. 109; *Bishop of Hereford v. Adams*, 7 Ves. 324; *A.-G. v. Corporation of Exeter*, 2 Russ. 47; 3 *ib.* 396; *A.-G. v. Brandreth*, 1 Y. & C. C. 200; *A.-G. v. Bovill*, 1 Ph. 762; *A.-G. v. Blizzard*, 21 B. 233.

On the question whether a gift to poor relations is charitable:—

Gifts to poor relations.

1. When the gift is of a lump sum immediately distributable, the cases are very unsatisfactory.

1. Of a lump sum immediately distributable.

a. In several cases it has been held that a gift to poor relations is to be confined to statutory next of kin, thus implying that the gift is not charitable, since, if it were no question of uncertainty could have arisen. *Carr v. Bedford*, 2 Ch. Rep. 146; *Griffith v. Jones*, *ib.* 394, anno 1694; *Widmore v. Woodroffe*, Amb. 636.

On the other hand, relations were not so restricted in *A.-G. v. Buckland*, cit. Amb. 71; 1 Ves. sen. 231; and *Mahon v. Savage*, 1 Sch. & Lef. 111.

In *Edge v. Salisbury*, Amb. 70; S. C. nom. *Goodynge v. Goodynge*, 1 Ves. sen. 230; Belt, 128, where the words were "nearest relations," of course only next of kin could take.

b. In *Brunsdon v. Woolridge*, Amb. 507; 1 Dick. 380, where the will was dated in 1757, and was therefore, since the Mortmain Act, a gift of *realty* to such poor relations as A. should think objects of charity, was held valid, and therefore not charitable; and see *Thomas v. Howell*, 18 Eq. 198. But

**Chap. XXVI.** *quære* whether these cases are satisfactory, and whether a gift to poor relations would not now be considered charitable.

2. Of an annual sum.

2. If, however, the gift is not of a sum distributable at once but of an annual sum, or if the testator has contemplated a perpetuity, the gift is charitable and not confined to statutory next of kin. *Isaac v. Defries*, Amb. 595; 17 Ves. 373, n.; *A.-G. v. Price*, 17 Ves. 371; *White v. White*, 7 Ves. 423; *Hall v. A.-G.*, 2 Jarm. on Wills, 128; *Gillam v. T aylor*, 16 Eq. 581.

If the gift is charitable only members of the class who are objects of charity, as defined by the statute of Elizabeth, can claim under it. Persons are not entitled to the benefit of the gift merely because they are the poorest of a wealthy class. *A.-G. v. Duke of Northumberland*, 7 Ch. D. 745.

A direction to distribute rents among certain named families as they may need has been held not to be a charity. *Lilley v. Hay*, 1 Ha. 580; *sed quære*.

Gifts in respect of an office.

In some cases the question arises, whether a bequest is given in respect of a certain office, and is therefore charitable, or whether the office is merely used to describe the person.

Thus, a gift to A., minister of a certain church, is not charitable. *Doe d. Phillips v. Aldridge*, 4 T. R. 264; *Donnellan v. O'Neill*, 1 R. 5 Eq. 523.

But a gift to A., minister of a chapel, and his successors for ever, is charitable. *Thornber v. Wilson*, 3 Dr. 245; see *Robb v. Bp. Dorian*, 1 R. 9 C. L. 483; *ib.* 11 C. L. 292; *Gibson v. Representative Church Body*, 9 L. R. Ir. 1.

Similarly, a gift for the benefit of Roman Catholic priests in or near London is charitable. *A.-G. v. Gladstone*, 13 Sim. 7; 1 Ph. 290.

It has, however, been held that a gift to ten poor clergymen to be selected by a trustee, is not charitable. *Thomas v. Howell*, 18 Eq. 198; and see *A.-G. v. Baxter*, 1 Vern. 248; 2 Vern. 104; explained in 7 Ves. 76.

Gift to trustees of a charity without more is not charitable.

A bequest to the trustees of a charity for a purpose to be declared, which the testator never does declare, affords no inference that the purpose was charitable, and is therefore void.

*Corporation of Gloucester v. Wood*, 3 Ha. 131; 1 H. L. 272; Chap. XXVI.  
*Aston v. Wood*, 6 Eq. 419.

## II. THE DOCTRINE OF CY PRÉS.

1. If there is a gift to a particular charitable society by name, and the society has existed, but at the time of the testator's death has ceased to exist, the legacy fails. *Clark v. Taylor*, 1 Dr. 642; *Marsh v. Means*, 3 Jur. N. S. 790; *Russell v. Kellett*, 3 Sm. & G. 264; *Langford v. Gowland*, 3 Giff. 617; *Fisk v. A.-G.*, 4 Eq. 521; *Makeown v. Ardagh*, I. R. 10 Eq. 445; *In re Ovey*; *Broadbent v. Barrow*, 29 Ch. D. 560.

Gift to a particular charitable society may fail by lapse.

If, however, the charity exists at the testator's death, but expires before the estate is administered, the legacy goes to charitable purposes *cy prés*. *Hayter v. Trego*, 5 Russ. 113.

And, if the bequest to the society is expressed to be for a charitable object, the failure of the trustee will not destroy the charitable gift. *Templemoyle School*, I. R. 4 Eq. 295; *Carbery v. Cox*, 3 Ir. Ch. 231; *Marsh v. A.-G.*, 2 J. & H. 61.

General charitable intention.

If the society is misdescribed, the Court will, if possible, discover from surrounding circumstances what society was intended. *Wilson v. Squire*, 1 Y. & C. C. 654; *Bunting v. Marriott*, 19 B. 163; *Kilvert's Trusts*, 12 Eq. 183; 7 Ch. 170; see *Coldwell v. Holme*, 2 Sm. & G. 31; *Makeown v. Ardagh*, I. R. 10 Eq. 445.

Misdescription of a charitable society.

If, however, there is no existing charitable society sufficiently, or there are several equally, answering the description, the gift will not be void, but will be applied *cy prés* to charitable purposes, or be divided among the several claimants. *Simon v. Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Loscombe v. Wintringham*, 13 B. 87; *Re Maguire*, 9 Eq. 632; *Re Alchin's Trusts*, 14 Eq. 230.

2. A gift for a clearly-defined and particular charitable object, as to build a church in a particular place, will fail if the object becomes impossible. *A.-G. v. Bishop of Oxford*, 1 B. C. C. 444 n.; *Cherry v. Mott*, 1 M. & C. 123; *Russell v. Kellett*, 3 Sm. & G. 264; see, however, as to the limits of this doctrine, *A.-G. v. Bowyer*, 3 Ves. 724; *Abbott v. Fraser*, L. R. 6 P. C. 96.

Gift for a definite charitable object fails if the object is impossible.

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The Court will direct an inquiry as to the possibility of effecting the object.

Gift to charity upon an event too remote is void.

Discretion to trustees to apply the whole to charity or other indefinite objects.

In such a case it seems the Court will retain the fund for a time and direct an inquiry as to the possibility of carrying out the bequest. *A.-G. v. Bishop of Chester*, 1 B. C. C. 444; *Baldwin v. Baldwin*, 22 B. 419; *Sinnett v. Herbert*, 7 Ch. 232; *Chamberlayne v. Brockett*, 8 Ch. 206; see, too, *Abbott v. Fraser*, L. R. 6 P. C. 96.

Though, on the other hand, if the gift to the charity is expressly made upon some event which is too remote, the gift would be void: as, for instance, a gift of a sum of money to build almshouses, when land should be given. *Chamberlayne v. Brockett*, *supra*.

The question as regards remoteness is whether the property is at once devoted to charity, the actual application being postponed from the necessities of the case. See *Biscoe v. Jackson*, 50 L. J. Ch. 597; 51 *ib.* 464.

3. Where a discretion is left to trustees, which would empower them to apply the whole of the gift either to charitable or other indefinite purposes, the whole gift is void, as it does not appear that the chief object was charity, and, on the other hand, the other object is void for uncertainty. *Williams v. Kershaw*, 5 L. J. Ch. 84; 5 Cl. & F. 111; *James v. Allen*, 3 Mer. 17; *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521; *Ommaney v. Butcher*, T. & R. 260; *Vezey v. Jamson*, 1 S. & St. 69; *Kendall v. Granger*, 5 B. 300; *Thompson v. Thompson*, 1 Coll. 398; *Boyle v. Boyle*, Ir. 11 Eq. 433; *In re Hewitt's Estate*; *Mayor of Gateshead v. Hudspeth*, 49 L. T. 587; see *In re Sutton*; *Stone v. A.-G.*, 28 Ch. D. 464.

The trustees cannot exercise their discretion and appoint the whole to charity. *In re Jarman's Estate*; *Leavers v. Clayton*, 8 Ch. D. 584.

Whether the result would be the same, where the whole might have been applied by the trustees either to charity or some other definite and ascertained object, seems uncertain. *Down v. Worrall*, 1 M. & K. 561; a case of very doubtful authority.

If part must be applied in charity, the Court will ascertain the amount.

But, if the bequest is such, that a portion must be applied to charity, the gift is good, although the charitable trust may be coupled with other trusts, which are void for uncertainty.

In such a case, if it cannot be ascertained how much ought to be applied to each object, the gift will be equally divided among the several objects, including those which are void, as to which the gift will fail *pro tanto*. *Doyley v. A.-G.*, 4 Vin. 485; 7 Ves. 58 n.; *Salisbury v. Denton*, 3 K. & J. 529; *Crafton v. Frith*, 20 L. J. Ch. 198; *Hoare v. Osborne*, L. R. 1 Eq. 585; *In re Rigley's Trusts*, 36 L. J. Ch. 147; see, too, *Re Hall's Charity*, 14 B. 115. Chap. XXVI

If it is possible to estimate how much ought to be given to each object, an inquiry will be directed. *Adnam v. Cole*, 6 B. 353; *Champney v. Davy*, 11 Ch. D. 949.

4. If it is clear that the testator intended to give to charity generally, the bequest will not fail: Where there is a general charitable intent, the gift is applied *cy près*.

a. by the failure of the testator to appoint the particular objects he intends to benefit, though the bequest may be to such charitable uses as he shall appoint. *Mills v. Farmer*, 1 Mer. 55; *Commissioners of Charitable Donations v. Sullivan*, 1 D. & War. 501; *Gillan v. Gillan*, 1 L. R. Ir. 114; *Pocock v. A.-G.*, 3 Ch. D. 342.

b. or by reason of the death, revocation of the appointment, or refusal to act of persons in whom a similar power has been vested. *Moggridge v. Thackwell*, 7 Ves. 36; 13 Ves. 416; *White v. White*, 1 B. C. C. 12; *A.-G. v. Boulton*, 2 Ves. jun 380; 3 Ves. 220.

c. or by the failure or non-existence of the particular objects he has pointed out. *Loscombe v. Wintringham*, 13 B. 87; *Hayter v. Trego*, 5 Russ. 113; *Reeve v. A.-G.*, 3 Ha. 191.

d. or even by the fact that some of the objects specified are void. *Fisk v. A.-G.*, 4 Eq. 521; *Dawson v. Small*, 18 Eq. 114.

e. or by the fact that the bequest is to be applied to a particular object at a future time beyond the limits of perpetuity. *Chamberlayne v. Brockett*, 8 Ch. 206.

5. Where there is a general charitable intention, particular gifts to charity will be applied *cy près*, and will not fall into the residue, though the residue itself may be given to a charitable object, unless the particular gifts are expressly directed to fall into the residue upon failure of the charitable objects to which they are given. *Lyons v. Advocate-General of Bengal*, 1 App. C. 91. Whether particular charitable gifts which fail fall into the residue which is also given to charity.

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Gift contrary  
to policy of a  
statute.

6. Where a bequest is void as contravening the policy of a statute, it will not be carried out *cy près*. *Thrupp v. Collett*, 26 B. 125; *Sims v. Quinlan*, 16 Ir. Ch. 191; 17 *ib.* 43; *Walsh v. Walsh*, I. R. 4 Eq. 397.

Increase in  
value of rents  
and profits  
given to  
charity.

7. Where the whole of the rents and profits of land are given to charity, but the objects pointed out do not exhaust the fund, the Court distributes the surplus *cy près*. *Arnold v. A.-G.*, Shower P. C. 22; *Pieschel v. Paris*, 2 S. & St. 384.

Whole rent  
given to  
charity, the  
increase also  
passes.

Where a sum, which in fact amounts to the whole of the rents and profits of certain land, is given to charity, this is in effect a dedication to charity of the land itself, and any increase in the rents and profits goes to the same purposes. *Thetford School Case*, 8 Co. R. 130 b.

Similarly, if the testator has shown an intention to dispose of the whole to charitable purposes, though there may be a residue undisposed of, it will go to the same purposes. *A.-G. v. Drapers*, 2 B. 508.

And where the whole rents are given in certain proportions among several charitable objects, any increase is apportioned rateably among those objects, subject to the discretion of the Court. *A.-G. v. Jesus Coll.*, 29 B. 163; *A.-G. v. Marchant*, L. R. 3 Eq. 424; *Merchant Taylors v. A.-G.*, 11 Eq. 35; 6 Ch. 513; *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1.

When certain  
payments are  
directed out  
of the rents  
for charitable  
objects,  
leaving a  
surplus, the  
increase does  
not pass to  
the charitable  
objects.

But where rents and profits of land are given to a corporation and certain fixed charitable payments are directed, which do not exhaust the whole, and there is no gift of the residue, the residue belongs to the corporation. *A.-G. v. Mayor of Bristol*, 2 J. & W. 291; *A.-G. v. Brasenose Coll.*, 2 Cl. & F. 295; *A.-G. v. Trinity College*, 24 B. 383.

*A fortiori*, if the surplus is expressly given to the corporation, though the amount of it be specifically mentioned by the testator, any increase, after the payments directed have been made, belongs to the corporation. *Southmolton v. A.-G.*, 5 H. L. 1; *Mayor of Beverley v. A.-G.*, 6 H. L. 310; *A.-G. v. Dean of Windsor*, 8 H. L. 369.

If, among the particular payments directed, some are not charitable, but are to be made to individuals and cannot have been intended to abate, there is an additional argument that

none of the particular payments were either to abate or to increase, and that the surplus, whatever it might be, was to go to the donees in trust. *A.-G. v. Cordwainers*, 3 M. & K. 534; *Mayor of Beverley v. A.-G.*, 6 H. L. 310. Chap. XXVI.

On the other hand, if the surplus undisposed of is insignificant, and there is a direction, that the particular payments are to abate proportionately in the event of depreciation of the property, the inference arises, that they were in like manner to share proportionally in any increase. *Mercers' Co. v. A.-G.*, 2 Bl. N. S. 165.

### III. ADMINISTRATION OF CHARITABLE GIFTS.

When the bequest is to an existing charitable institution, the bequest is left to be administered as part of the funds of that institution. *Society for P. G. v. A.-G.*, 3 Russ. 142; *Well-beloved v. Jones*, 1 S. & St. 43. A gift to a charitable institution is administered by the institution.

But if the bequest is to an existing charitable institution for purposes other than the purposes for which it exists, the Court will administer the bequest by a scheme to be settled in Chambers, *ib.*

And, generally, wherever trustees are interposed by the testator, his object will be carried out by the Court by a scheme; but if no trustees are interposed the charity is administered under the Sign Manual. *Moggridge v. Thackwell*, 7 Ves. 36; *Paice v. Abp. of Canterbury*, 14 Ves. 364; *Kane v. Cosgrave*, 1. R. 10 Eq. 211. A gift to trustees for charitable purposes is administered by the Court.

If, however, there is a gift to foreign trustees for charitable purposes in a foreign country, and the trustees disclaim, the Court has no power to settle a scheme, and the gift fails. *A.-G. v. Sturge*, 19 B. 597; *New v. Bonaker*, 4 Eq. 655. Gift to foreign trustees for a foreign charity.

And in some cases, where an annual sum has been directed to be given to a person for his life to be distributed in charity, the Court has refused to interfere with the discretion of the trustee by settling a scheme. *Bennett v. Honeywood*, Amb. 708; *Waldo v. Cayley*, 16 Ves. 206; *Horder v. Earl of Suffolk*, 2 M. & K. 59. Cases in which the discretion of the trustee is not interfered with.

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Where a fund was given for the benefit of the blind in Invernesshire, and the surviving executor declined to act, the Court gave liberty to the Attorney-General to apply to the Court of Session for a scheme. *In re Fraser; Yeates v. Fraser*, 22 Ch. D. 827.

## IV. WHAT MAY NOT BE GIVEN TO CHARITY.

Statute of  
Mortmain,  
9 Geo. II.  
c. 36.

By the so-called statute of Mortmain, 9 Geo. II. c. 36, it is enacted, that no hereditaments, corporeal or incorporeal, nor any personal estate to be laid out in the purchase of lands, shall be given for the benefit of any charitable uses whatsoever, except in the manner therein directed; and, in effect, all gifts by will of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, are declared to be null and void.

Legacy duty.

If a charitable legacy is given free of duty, this is in effect a gift of the duty, which cannot therefore be paid out of impure personalty. *Wilkinson v. Barber*, 14 Eq. 96.

What is an  
interest in  
land within  
the statute.  
Money to  
arise from  
sale of land.

A. The decisions are numerous as to what is an interest in land within the statute of *Mortmain*.

1. Money to arise from the sale of land directed by the testator, though the land is devoted to partnership purposes, is clearly within it. *Page v. Leapingwell*, 18 Ves. 463; *British Museum v. White*, 2 S. & St. 595; *Thorner v. Wilson*, 4 Dr. 350; *Incorporated Church Building Society v. Coles*, 5 D. M. & G. 324; *Ashworth v. Munn*, 28 W. R. 965; 47 L. J. Ch. 747; 15 Ch. D. 563.

Lien for  
purchase  
money.

So is the purchase money for land contracted to be sold by the testator, but in respect of which he has a lien at his death, and also a premium payable to the testator in respect of a lease

granted at a low rent. *Harrison v. Harrison*, 1 R. & M. 71; Chap. XXVI.  
*Shepherd v. Beetham*, 6 Ch. D. 597.

2. On the question whether money to arise from the sale of land under an instrument other than the testator's will is within the Act, the cases are not entirely satisfactory.

Money to arise from sale of land under a prior testator's will.

Where land is given by a first testator on trust for sale, a gift of the proceeds by the will of a second testator is within the Act if the time for selling the land has not arrived at the death of the second testator, or if the land has not in fact been sold, and the second testator might have elected to take it as land. *Brook v. Badley*, 4 Eq. 106; 3 Ch. 672; *Lucas v. Jones*, 4 Eq. 73; *Attorney-General v. Harley*, 5 Mad. 321.

Where land is given by a first testator on trust for sale and division among several persons, a gift of the proceeds by the will of a second testator, which does not take effect till after the death of the first, is it seems within the Act, if the property has not in fact been sold before the second testator's death. *Marsh v. A.-G.*, 2 J. & H. 61, is overruled by *Brook v. Badley*, 3 Ch. 672; see *Ashworth v. Munn*, 15 Ch. D. 563.

The case has been held not within the Act, where leaseholds have been given on trust for sale to pay debts, and have been sold by the executors, in course of administration, after the death of the second testator, though the pure personalty was enough to satisfy the debts. *Shadbolt v. Thornton*, 17 Sim. 49; 13 Jur. 597; but this case is of very doubtful authority. See *Lucas v. Jones*, *supra*.

3. Further, within the Act are the proceeds of growing crops (a), leaseholds (b), money secured by mortgage of land (c), or charged upon land (d), including equitable mortgages (e), and mortgages of leaseholds (f). *Symonds v. Marine Society*, 2 Giff. 325 (a). *Johnston v. Swann*, 3 Mad. 457; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Entwistle v. Davis*, 4 Eq. 272 (b). *White v. Evans*, 4 Ves. 21; *Corbyn v. French*, 4 Ves. 418; *Currie v. Pye*, 17 Ves. 462; *Paice v. Archbishop of Canterbury*, 14 Ves. 364 (c). *A.-G. v. Harley*, 5 Mad. 321; *Harrison v. Harrison*, 1 R. & M. 71 (d). *Alexander v. Brame*, 30 B. 153 (e). *Chester v. Chester*, 12 Eq. 444 (f).

Crops, leaseholds.  
Mortgages and charges.

Money secured by mortgage of a life interest in a fund

Chap. XXVI. invested on mortgage of land is not, but money secured by mortgage of the life interest and reversion in such a fund is within the Act, as in the latter case the mortgagee could by foreclosure make himself the owner of the security upon which the fund is invested. *In re Watts; Cornford v. Elliott*, 27 Ch. D. 319; 29 Ch. D. 947.

Mortgage of  
real and  
personal  
property.

4. Though personalty may happen to be included in a mortgage given by will, the bequest will not be apportioned, nor will there be an apportionment, if the bequest is of a sum charged upon realty and personalty by a prior testator. *Brook v. Badley*, L. R. 3 Ch. 672; see *In re Hill's Trusts*, 16 Ch. D. 173; *In re Watts; Cornford v. Elliott, supra*.

But if a sum is secured by a promissory note and a mortgage by deposit, and the property mortgaged is worth only half the debt, the bequest is valid as regards the portion not secured by the mortgage. *Smith v. Sopwith*, W. N. 1877, 208.

Mortgages of  
rates and tolls.

5. Mortgages of rates and tolls recoverable only by action or distress would probably now be held not to be within the Act. *Jervis v. Lawrence*, 22 Ch. D. 202; see *Attree v. Hawe*, 9 Ch. D. 337; *In re Harris; Jacson v. Governors of Queen Anne's Bounty*, 15 Ch. D. 561; *Cavendish v. Cavendish*, 24 Ch. D. 685; reversed W. N. 1885, 42.

The following cases as to mortgages of rates on occupiers of land leviable by distress (a), of poor rates (b), of turnpike tolls and harbour and dock rates (c), and Metropolitan Board of Works Consolidated Stock (d), may probably be considered overruled. *Thornton v. Kempson*, Kay, 592; *Chandler v. Howell*, 4 Ch. D. 651 (a). *Finch v. Squire*, 10 Ves. 41 (b). *Knapp v. Williams*, 4 Ves. 429, n.; *King v. Winstanley*, 8 Pr. 180; *Ion v. Ashton*, 28 B. 379; *Alexander v. Brame*, 30 B. 153; *Tyrrell v. Whinfield*, W. N. 1877, 99 (c). *Cluff v. Cluff*, 2 Ch. D. 222 (d).

Arrears of  
rent, judg-  
ment charged  
on land.

6. Within the statute are arrears of interest due on a mortgage, and rent accrued due since the testator's death, on land contracted to be sold, and a judgment debt, if it is a charge upon realty. *Alexander v. Brame*, 30 B. 153; *Edwards v. Hall*, 11 Ha. 1; *Collinson v. Pater*, 2 R. & M. 344.

Voluntary

7. A voluntary covenant to leave money by will to a charity

is in substance a legacy, and is void if the testator leaves only real assets; if he leaves mixed assets, there will be an abatement in the proportion of the pure to the impure personalty. *Jeffries v. Alexander*, 7 D. M. & G. 525; 8 H. L. 594; *Fox v. Lowndes*, 19 Eq. 453. Chap. XXVI.  
covenant to  
leave money  
is void as  
regards real  
assets.

But where A. covenants to pay a sum to trustees for B. for life with remainder as B. appoints, and B. appoints to a charity, the appointment is good, though the sum may be payable out of impure personalty of A. *In re Robson*; *Emley v. Davidson*, 19 Ch. D. 156.

8. Shares in companies, whether incorporated or not, are not within the statute, provided land is held by them only for the common purposes of the undertaking, and this is the case whether the shares are declared to be personal estate or not, provided the right of the shareholder is merely to call for a share of the profits, and not for a specific part of the land itself. *Walker v. Milne*, 11 B. 507; *Myers v. Perigal*, 11 C. B. 90; 2 D. M. & G. 599; *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Hayter v. Tucker*, 4 K. & J. 243; *Entwistle v. Davis*, 4 Eq. 272. *Morris v. Glynn*, 28 B. 218, cannot be considered law. Shares in  
public com-  
panies are  
not within  
the statute,

It makes no difference that the company whose shares are in question has placed itself in the position of landlord, by letting its land to another company. *Linley v. Taylor*, 1 Giff. 67; 2 D. F. & J. 84.

But if the land is held in trust for each individual shareholder in proportion to his shares, so that each shareholder has a direct and definite interest in the land, the shares are within the statute. *Baxter v. Brown*, 7 M. & Gr. 198. See *Watson v. Spratley*, 10 Ex. 222. unless each  
shareholder is  
entitled to a  
definite  
proportion  
of land.

9. Debenture stock, debentures and mortgage debentures of railway companies charging the undertaking and tolls of the company are not within the Act. *Attree v. Hawe*, 9 Ch. D. 337; *Holdsworth v. Davenport*, 3 Ch. D. 185; *In re Mitchell's Estate*; *Mitchell v. Moberly*, 6 Ch. D. 655, overruling *Ashton v. Lord Langdale*, 4 De G. & S. 402. Debenture  
stock,  
mortgage  
debentures.

10. Bonds charged by justices on the police rates since 7 & 8 Vict. c. 33, under which Act justices no longer have power themselves to levy a rate, but issue a precept to the guardians Bonds  
charged on  
police rates.

**Chap. XXVI.** of the unions for payment of the amount required, are not within the Act. *In re Harris*; *Jacson v. Governor's of Queen Anne's Bounty*, 15 Ch. D. 561.

**Rent, royalties, fixtures.** 11. Arrears of rent due at the testator's death (a), apportioned rent (b), a royalty on minerals (c), and tenants' fixtures (d), are not within the Act. *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74 (a). *Thomas v. Stowell*, 18 Eq. 198 (b). *Brook v. Bradley*, 4 Eq. 106 (c). *Johnson v. Swann*, 3 Mad. 457 (d).

**Money to be invested in land.** B. As to what is a gift of personalty to be laid out in the purchase of land or any interest therein within the Mortmain Act:

**Money to be invested on real or mortgage security.** 1. Money directed to be invested on real securities, or even merely on mortgage security generally, is within the Act. *Baker v. Sutton*, 1 Kee. 224.

The same is the case if the ultimate object of the bequest is investment in land, though other investments may be authorised in the meantime. *Mann v. Burlingham*, 1 Kee. 235; *A.-G. v. Hodgson*, 15 Sim. 146.

But the gift is valid if an option is left to trustees; for instance, if money is directed to be invested in real or other securities. *A.-G. v. Goddard*, T. & R. 348; *Graham v. Paternoster*, 31 B. 30; *Beaumont's Trusts*, 32 B. 191.

**Bequest to pay off the mortgage debt of a charity.** 2. A bequest of money to pay off a debt secured by mortgage, whether legal or equitable, of land belonging to a charity is void. *Corbyn v. French*, 4 Ves. 418; *Waterhouse v. Holmes*, 2 Sim. 162; *In re Lynall's Trusts*, 12 Ch. D. 211.

But this is not the case where the debt is no charge upon the land. *Bunting v. Marriott*, 19 B. 163.

**Gift to improve, enlarge, or repair.** 3. A gift to improve, repair or enlarge an existing charitable institution is valid. *Edwards v. Hall*, 11 H. 1; 6 D. M. & G. 74; *Hawkins' Trust*, 33 B. 570.

**Gift to build a charitable institution is void.** 4. A gift to build a charitable institution is held *prima facie* to imply a direction to purchase land for the purpose, and is void under 9 Geo. II. c. 36. *Chapman v. Brown*, 6 Ves. 404; *A.-G. v. Parsons*, 8 Ves. 186; *Pritchard v. Arbouin*, 3 Russ. 657; 456; *A.-G. v. Davies*, 9 Ves. 535; *Martin v. Wellsted*, 2 W. R. 657; *Longstaff v. Rennison*, 1 Dr. 28; *Watmough's Trusts*, 8 Eq. 272; *Hawkins v. Allen*, 10 Eq. 246; *Pratt v. Harvey*, 12 Eq. 544.

A gift to erect a charitable institution does not become valid

because made to a corporation which has power to hold land in mortmain, and, in fact, possesses land available for the purposes of the bequest. *In re Cox*; *Cox v. Davie*, 7 Ch. D. 204. Chap. XXVI.

5. If, however, an option is given to the trustees either to build a charitable institution or bestow the money in some other manner which is legal, the bequest is good as regards the legal purpose. *Sorresby v. Hollins*, 9 Mad. 221; *A.-G. v. Whitchurch*, 3 Ves. 141; *Incorporated Society v. Barlow*, 3 D. M. & G. 120; 17 Jur. 217; *Mayor of Faversham v. Ryder*, 18 B. 318; 5 D. M. & G. 350; *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Dent v. Allcroft*, 30 B. 335; *University of London v. Yarrow*, 1 De G. & J. 72.

Discretion to build or apply the money in some legal manner.

And a bequest of impure personalty to such charities as trustees may select is good, since the power can be exercised in favour of charities exempt from the law of mortmain. *Lewis v. Allenby*, 10 Eq. 668.

A discretion to trustees to give a legacy to the poor as they think fit is not within this principle. *In re Clark*; *Husband v. Martin*, 33 W. R., 516.

6. A direction to "establish" would, it seems, *prima facie* imply building, and come under the same rule as a bequest for building. *A.-G. v. Hodgson*, 15 Sim. 146; *Longstaff v. Rennison*, 1 Dr. 28; *Re Clancy*, 16 B. 295; *A.-G. v. Hall*, 9 H. 647; *Dunn v. Bownas*, 1 K. & J. 591; *Tatham v. Drummond*, 4 D. J. & S. 484. Gift to "establish" a charity.

The word may be used in such a context as to exclude building. *A.-G. v. Williams*, 2 Cox. 387; *Hill v. Jones*, 2 W. R. 657.

And the fact, that an annual sum only is given to establish a school, would apparently go to show that the testator did not contemplate building. *Hartshorne v. Nicholson*, 26 B. 58.

The same is the case with an annual sum given to "provide" a school, which may only mean that a school is to be hired. *Johnston v. Swann*, 3 Mad. 457; *Crafton v. Frith*, 20 L. J. Ch. 198; 15 Jur. 737.

A gift to "support or found" a school is valid. *In re Hedgman*; *Morley v. Croxon*, 8 Ch. D. 156.

A bequest to "found" a chapel implies building. *Hopkins v. Phillips*, 3 Giff. 182.

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A direction to hire rooms, does not bring a gift within the Mortmain Act.. *In re Robson*; *Emley v. Davidson*, 19 Ch. D. 156.

Gift to endow a charity.

On the other hand, a gift to "endow" would not, *prima facie*, authorise building, though the word may be so used as to involve it. *Salisbury v. Denton*, 3 K. & J. 529; *Edwards v. Hall*, 11 Ha. 1; *Sinnett v. Herbert*, 7 Ch. 233; *Kirkbank v. Hudson*, 7 Pr. 212.

Evidence of intention that the testator did not contemplate the purchase of land.

7. But, even though the object of the gift may *prima facie* imply the purchase of land, it may appear that the testator had no such intention. He may have contemplated the building as to be erected either on land already in mortmain, or on land to be provided after his death from some other source.

(a.) Thus, if the testator contemplated land already in mortmain, a gift to build a charitable institution is good. This will be the case:—

Land in mortmain referred to expressly,

- (i.) If land already in mortmain is expressly referred to in the will. *Glubb v. A.-G.*, Amb. 373; *Brodie v. Duke of Chandos*, 1 B. C. C. 444 n.

If it is uncertain, whether the land upon which the testator directs the money to be laid out is already in mortmain or not, an inquiry will be directed. *Champney v. Davy*, 11 Ch. D. 949.

by implication,

- (ii.) If land already in mortmain is impliedly referred to, as by a direction to build in such manner as is consistent with law. *Dent v. Allcroft*, 30 B. 335; *Sewell v. Crewe Read*, L. R. 3 Eq. 60.

by external evidence.

- (iii.) External evidence may be adduced in order to show that the testator must have contemplated land in mortmain, though as to the exact amount of evidence necessary for this purpose the cases are not quite consistent. *A.-G. v. Hyde*, Amb. 751; *Giblett v. Hobson*, 3 M. & K. 517; *Booth v. Carter*, L. R. 3 Eq. 757; *Cresswell v. Cresswell*, 6 Eq. 69.

(b.) When the testator intends the buildings to be erected on land to be supplied from some other source after his death:—

Inducement to give land.

- (i.) It is clear, that a direct inducement offered to any person

to give land for the purpose of the building, as, for Chap. XXVI.  
instance, a bequest to A. to build if he will give the  
land, is bad. *A.-G. v. Davies*, 9 Ves. 535.

- (ii.) If the trustees are directed to beg the land from some person, but their own implied power to purchase remains, the bequest is bad. *Mather v. Scott*, 2 Kee. 172. Direction to beg land.
- (iii.) Where the bequest is to build, with an express direction, that land is not to be bought for the purpose, or that the Mortmain Act is not to be violated, the bequest is valid, whether made conditional upon land being provided, or without any condition. *Henshaw v. Atkinson*, 3 Mad. 306; *A.-G. v. Williams*, 2 Cox, 387; *Carwood v. Thompson*, 1 Sm. & G. 409; *Philpott v. Governors of St. George's Hospital*, 6 H. L. 338 (overruling *Trye v. Corporation of Gloucester*, 14 B. 173); *Chamberlayne v. Brockett*, 8 Ch. 206; *In re White's Trusts*, 30 W. R. 837; *Re Jackson*; *Biscoe v. Jackson*, 46 L. T. 355; 51 L. J. Ch. 464. Direction not to buy land.

8. Upon similar principles, a bequest to the trustees of a charity which exists only for the purchase of land is void. *Widmore v. Woodroffe*, Amb. 636; *Middleton v. Clitheroe*, 3 Ves. 734; *Denton v. Lord J. Mannors*, 25 B. 38; 2 De G. & J. 675. Bequest to a charity, the object of which is to acquire land.

On the other hand, it is good if it exists for the purchase of land or other objects. *Incorporated Society v. Barlow*, 3 D. M. & G. 120; *Carter v. Green*, 3 K. & J. 591; *Wilkinson v. Barber*, 14 Eq. 96.

9. A bequest of money to be employed in enlarging or improving a charitable object attempted to be created by a testator, fails, if the original object is invalid. *A.-G. v. Hinaman*, 2 J. & W. 270; *Smith v. Oliver*, 11 B. 481; *Crump v. Playfoot*, 4 K. & J. 479; *Green v. Britten*, 42 L. J. Ch. 187; *In re Cox*; *Cox v. Davie*, 7 Ch. D. 204.

10. A bequest of the proceeds of sale of land in England to be laid out in the purchase of land for charitable purposes in a country where land may be well given to charity is void. *Curtis v. Halton*, 14 Ves. 537; *A.-G. v. Mill*, 3 Russ. 328; 5 Bl. N. C. 593; 2 Dow. & Cl. 393. Bequest for foreign charity.

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But the Statute of Mortmain leaves bequests of money to be laid out in the purchase of land for charitable purposes in other countries untouched. *Mackintosh v. Townsend*, 16 Ves. 330; see *Whicker v. Hume*, 7 H. L. 124.

## C. Exceptions from the Statute of Mortmain.

Universities of Oxford and Cambridge, and Eton, Winchester, and Westminster excepted from the Act.

The Universities of Oxford and Cambridge, and the Colleges of Eton, Winchester and Westminster, are excepted from the operation of the Mortmain Act. But this exception only authorises devises to these colleges for all or some of the purposes for which they exist, and not upon trust for other charitable objects. *A.-G. v. Tancred*, 1 Ed. 10; 1 W. Bl. 90; Amb. 351; *A.-G. v. Whorwood*, 1 Ves. 534; *A.-G. v. Munby*, 1 Mer. 327.

And if there is a good devise of lands to a college for charitable objects, which the college refuses to accept, the object will be carried out *cy près*. *A.-G. v. Andrew*, 3 Ves. 633.

Whether a college takes the legal estate.

Before the Wills Act, it seems that a devise to a college did not carry the legal estate, notwithstanding *Benet College v. Bishop of London*, 2 W. Bl. 482, which was decided upon an erroneous interpretation of the statute 43 Eliz. c. 4, that statute being merely remedial and not intended to authorise what was illegal before. See *Incorporated Society v. Richards*, 1 D. & War. 258.

Whether a devise to a college since the Wills Act would carry the legal estate seems doubtful. See p. 88.

In what cases charities empowered to hold lands may take by devise.

The fact that a charity is empowered by Act of Parliament to hold lands does not entitle a testator to devise lands to it. *Robinson v. Governors of London Hospital*, 10 Ha. 19; *Nethersole v. School for the Indigent Blind*, 11 Eq. 1; *Chester v. Chester*, 12 Eq. 444.

But where charities are empowered to acquire lands by will, testators are of course entitled to devise lands to them. *Perring v. Traill*, 18 Eq. 88.

But it seems that such a power to take lands by devise, would not necessarily authorise a bequest of money secured on mortgage. *Chester v. Chester*, *supra*.

Bequest of money to be employed on

An Act passed before the Act 9 Geo. II. c. 36, and enabling a charitable corporation to take lands without a licence in mort-

main, by authorising testators to devise lands to the corporation, Chap. XXVI.  
 does not exempt the corporation from the operation of 9 Geo. II. c. 36. *Luckraft v. Pridham*, 6 Ch. D. 205. land devised to charity by the testator.

Under 42 Geo. III. c. 116, s. 50, money may be given by will or otherwise for redeeming the land tax on lands settled to charitable uses. Redemption of land tax.

Under section 162 of the same Act land tax redeemed or purchased may be given by deed or will for the augmentation of any living.

The statute 43 Geo. III. c. 108, authorises the devise of lands not exceeding five acres, or of goods or chattels to the amount of 500*l.* for erecting, repairing, or providing any church or chapel where the Liturgy of the Church of England is used, or any mansion-house for any minister of the said Church, and other similar purposes. Statute 43 Geo. III. c. 108.

Under this Act a secret trust to devote a chapel comprised in a residuary devise to the purpose of a parish church has been upheld. *O'Brien v. Tyssen*, 28 Ch. D. 372.

Under the same Act a bequest of 500*l.* towards building a church, if the testator survives the making of the will three months, is good. *Dixon v. Barlow*, 3 Y. & C. Ex. 677; *Girdlestone v. Creed*, 10 Ha. 480.

The Act, however, does not authorise a devise of lands to be sold and the proceeds to be applied towards the purposes of the Act. *Incorporated Church Building Society v. Coles*, 1 K. & J. 145; 5 D. M. & G. 324.

The effect of the Act is that under a bequest towards building a church the legacy will be apportioned between the pure and impure personalty, and be paid out of pure personalty to the extent of its proportion, and out of the impure personalty to the extent of 500*l.* *Sinnett v. Herbert*, 7 Ch. 232; *Champney v. Davy*, 11 Ch. D. 949.

Under 6 & 7 Vict. c. 37, s. 9, the Ecclesiastical Commissioners may constitute districts for spiritual purposes, and by section 22 land or money may be given by deed or will for the endowment of the minister of a district, or for providing a church or chapel under the Act. Endowment of districts for spiritual purposes.

Under this Act a direction to apply a sum for the purposes

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authorised by the Act, if the object can be legally carried out within twenty-one years from the testator's death, is valid, if a district is constituted within the stated period, though no district has been constituted at the testator's death. *Baldwin v. Baldwin*, 22 B. 419.

By the Public Parks, Schools and Museums Act, 1871 (34 Vict. c. 13), twenty acres may be given for a park, two acres for a museum, and one acre for a school-house, but the will must be executed twelve months before the death.

By the Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), ancient monuments, to which the Act applies, may be devised to the Commissioners of Works who may accept the devise.

A list of charities excepted from the Mortmain Act will be found in Tudor's Real Property Cases, p. 568.

Secret trust  
of land in  
favour of  
charity is bad,  
but the  
devisee takes  
the legal  
estate.

The Statute of Mortmain cannot be avoided by a secret trust in favour of a charity. *Russell v. Jackson*, 10 Ha. 204.

In such a case, however, the devisee takes the legal estate. *Sweeting v. Sweeting*, 12 W. R. 239.

Where land is devised on trust for a person for life with remainder to charity, the legal estate is well devised for life. *Young v. Grove*, 4 C. B. 668.

The legal estate passes when the trust is for charity, and for other objects which are valid. *Doe d. Chidgey v. Harris*, 16 M. & W. 517, 518.

But a devise of lands on an express trust for charity only is void, as regards the legal estate as well, by the statute 9 Geo. II. c. 36. *Doe d. Burdett v. Wrighte*, 2 B. & Ald. 710.

## CHAPTER XXVII.

### SUCCESSIVE AND CONCURRENT INTERESTS, JOINT TENANCY AND TENANCY IN COMMON.

#### I. DEVISE TO A CLASS IN TAIL.

IN some cases the question has arisen whether the gift is to several persons concurrently, or whether they are intended to take successively; thus a devise to the sons of a person in tail is, *prima facie*, a gift to a class. *De Windt v. De Windt*, L. R. 1 H. L. 87; *Surtees v. Surtees*, 12 Eq. 400. Chap. XXVII.  
Devise to a class in tail gives concurrent interests

But, if there is a general intention manifest to keep the estates together in a single line of enjoyment, the members of the class will take successively. *Cradock v. Cradock*, 4 Jur. N. S. 626, 656; *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160. unless there is an intention expressed to keep the property together in one line of enjoyment.

#### II. GIFTS TO A PARENT AND CHILDREN.

In the same way a gift to a parent and children is *prima facie* a gift to them concurrently. *Mason v. Clarke*, 17 B. 126; *Sutton v. Torre*, 6 Jur. 234; *Wilson v. Maddison*, 2 Y. & C. C. 372; *Beales v. Crisford*, 13 Sim. 592; *Newill v. Newill*, 12 Eq. 432; 7 Ch. 253. See *Cape v. Cape*, 2 Y. & C. Ex. 543. Gift to a parent and children gives them concurrent interests.

The fact, that the gift is to the parent in trust for herself and her children, is not sufficient to show that they are not to take concurrently. *Newill v. Newill*, 7 Ch. 253. See *Curtis v. Graham*, 12 W. R. 998. *Ward v. Grey*, 26 B. 485, probably goes beyond the present tendency of the Court.

But, if there is anything to show, that the parent is to take a different interest from that of the children, he will take for life, with remainder to the children. What is a contrary intention.

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Words of  
distribution  
applied to the  
children only.

1. If the bequest is to A. and his children as tenants in common, if more than one, showing that the tenancy in common is to apply to children only, the father takes for life. *Doe d. Davy v. Burnsall*, 6 T. R. 30 ; 1 B. & P. 215, where issue must have meant children by the force of the gift over in default of issue of such issue. See *Doe d. Gilman v. Elvey*, 4 East. 313.

Words of  
limitation  
applied to the  
children only.

2. A devise to A. and his children and the heirs of the parent and children, gives a joint estate in fee, or an estate tail to the parent, according as there are or are not children living at the time of the devise. *Oates d. Hatterly v. Jackson*, 2 Str. 1172 ; *Underhill v. Roden*, 2 Ch. D. 494.

But a devise to A. and his children, and the heirs of the children, would give A. an estate for life with remainder to his children. *Jeffery v. Honeywood*, 4 Mad. 398, was decided on this ground, though it would seem the word heirs referred to the parent as well as the children.

Settlement  
directed of  
the whole  
fund.

3. If the bequest is to a father and his children, and there is a desire expressed that the whole fund should be settled or secured, a term which would have no meaning as applied to the father's interest as joint tenant, the father takes for life. *Vaughan v. Marquis of Headfort*, 10 Sim. 639 ; *Combe v. Hughes*, 14 Eq. 415.

If a continuing trust is created, which is contemplated as outlasting the parent's life, there is room for a similar argument in favour of a life interest in the parent. *Ogle v. Corthorn*, 9 Jur. 325.

Gift of the  
whole fund to  
the separate  
use.

4. Whether, where the gift is to the separate use of the mother, it will be considered a sufficient indication of intention to cut the interest of the parent down to a life interest is not certain. On the whole, the better opinion seems to be, that where the words creating the separate use apply to the whole fund or legacy, it will be construed as giving the mother a life interest. *Newman v. Nightingale*, 1 Cox, 341 ; *French v. French*, 11 Sim. 257 ; *Bain v. Lescher*, 11 Sim. 397 ; *Froggatt v. Wardell*, 3 De G. & S. 685 ; *Dawson v. Bourne*, 16 B. 29 ; *Jeffery v. De Vitre*, 24 B. 296 ; *Scott v. Scott*, 11 Ir. Ch. 114 ; *Ogle v. Corthorn*, 9 Jur. 325, in which case the Vice-Chancellor

Wigram thought that a gift to the separate use was conclusive against the children participating with their mother. *Combe v. Hughes*, 14 Eq. 415. Chap. XXVII.

On the other hand, the cases of *De Witte v. De Witte*, 11 Sim. 41, and *Bustard v. Saunders*, 7 B. 92 (which, however, only followed *De Witte v. De Witte*), are inconsistent with this rule.

If the interest of the mother alone is given to her separate use, or the separate use attaches to the interests of all alike, no argument in favour of a life estate can be founded upon the separate use. *Fisher v. Webster*, 14 Eq. 283; *Newsom's Trusts*, 1 L. R. Ir. 373. Separate use attached to parent's interest or to interests of all.

The same is the case, if her interest only is directed to cease on marriage. *Izod v. Izod*, 11 W. R. 452.

5. If upon the marriage of their mother the fund is to be divided among the children, this affords an argument, that it is not to be divided before, and the mother takes for life or till marriage. *Mill v. Mill*, 1 R. 9 Eq. 104; *ib.* 11 Eq. 158. Division of the whole fund directed at a particular time.

6. If the whole fund is contemplated as remaining undisposed of, if there are no children, if there is a gift over for instance in default of children, the same construction is adopted. *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226. See *Lampley v. Blower*, 3 Atk. 396. Gift over of the entire fund if there are no children.

7. If the children are contemplated as taking shares in the whole fund by a direction, for instance, that if there is but one child the whole is to go to that child, since the children are to take the whole, the parent to take anything must take a life interest. *Garden v. Poultney*, Amb. 499; 2 Ed. 323; *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226. Children contemplated as taking the whole fund.

8. If the bequest is such, as expressly to include all the children of the parent, and not merely those in being at the period of distribution, it will be construed to give a life estate to the parent, with remainder to the children, since it is a singular intention to impute to the testator that the parent's interest in the estate should continually diminish on the birth of a new child. *Jeffery v. De Vitre*, 24 B. 296; *Jeffery v. Honeywood*, 4 Mad. 398. Express gift to after-born children.

9. If the legacy is payable in part at once, and in part at a future period, the parent will take for life, as otherwise different Part of the fund payable

- Chap. XXVII.** classes of children might take the two portions. *Morse v. Morse*, 2 Sim. 485.
- at a future period. 10. If in the event of the mother's death before the testator the children are to take unequal shares, the presumption of joint tenancy is apparently rebutted. *Armstrong v. Armstrong*, 7 Eq. 518.
- Effect of a gift to the children in unequal shares in certain events. 11. If the children are contemplated as not enjoying the property till after their mother's death, by being called heirs for instance, the parent takes for life only. *Crawford v. Trotter*, 4 Mad. 36; *Ogle v. Corthorn*, 9 Jur. 325; *Wilson v. Vansittart*, Amb. 561.
- Words implying that children are not to take till their parent's death. 12. There may be a reference to another gift, to assist the Court in giving the parent a life interest. *French v. French*, 11 Sim. 257; *In re Owen's Will*, 12 Eq. 316.
- Reference to other gifts. 13. An executory trust for A. and her children will be settled on A. for life, and afterwards for her children. *In re Bellasis' Trust*, 12 Eq. 218.
- Executory trust.

### III. JOINT TENANCY, TENANCY IN COMMON AND BY ENTIRETIES.

- Gift to several with words of limitation is a joint tenancy. A. What creates a joint tenancy.  
A gift to two persons or to a class with words of limitation, *prima facie*, constitutes a joint tenancy between them.
- Interests of joint tenants need not vest at the same time. The rule, that the interests of joint tenants must vest at the same time, does not apply to estates raised by use, or to wills. *Macgregor v. Macgregor*, 1 D. F. & J. 63.
- "All and every." Thus a gift to the children or to all and every the child or children of A. creates a joint tenancy between them. *Kenworthy v. Ward*, 11 Ha. 196; *Morgan v. Britten*, 13 Eq. 28; see *Jury v. Jury*, 9 L. R. Ir. 207.
- Devise to two in tail who may marry. A devise to two persons who may intermarry, though they may both be married already, and the heirs of their bodies, makes them joint tenants in tail. Co. Lit. s. 25, p. 25 b.
- Appointment to object and non-object. If an appointment under a special power is made in favour of A. and B. as joint tenants, and A. is not an object of the power, B. takes only a moiety, and the other moiety goes as in default of appointment. *In re Kerr's Trusts*, 4 Ch. D. 600.

A joint tenancy in income is severed as regards each instalment as soon as it becomes payable. *Walmsley v. Foxhall*, 40 L. J. Ch. 28. Chap. XXVII.  
Joint tenancy  
in income.

B. Joint life estates several inheritances.

Intermediate between cases of joint tenancy and of tenancy in common falls a class of cases, in which, in order to give effect to the whole devise, joint estates for life and several inheritances are given.

A devise to several persons who cannot marry, and the heirs of their bodies, gives them joint estates for life with several inheritances in tail. *Ferne*, C. R. 35; *Cook v. Cook*, 2 Vern. 545; *Forrest v. Whiteway*, 3 Ex. 367; *Edwards v. Champion*, 3 D. M. & G. 202, 214; *Tufnell v. Borrell*, 20 Eq. 194. Devise to  
several in tail  
who cannot  
marry.

A devise to a man and two women, or to two men and one woman, and the heirs of their bodies gives them joint estates for life and several inheritances. Co. Lit. 25 b.

A devise to two husbands and their wives, and the heirs of their bodies, gives joint estates for life, and several inheritances; the one husband and wife the one moiety, the other husband and wife the other moiety. Co. Lit. 25 b.

A devise to several and the heirs of their respective bodies, gives joint estates for life and several inheritances. But a devise to children and the heirs of their bodies respectively, gives several estates in tail. *In re Tiverton Market Act*; *Ex parte Tanner*, 20 B. 374. Force of word  
respective.

In the case of real estate devised to several and their heirs a similar principle has in several cases been followed, words of severance being referred to the inheritance, leaving the life interests joint. Devise to  
several in fee.

This construction is assisted if there is an express limitation to the survivor or such words as jointly are used. *Barker v. Giles*, 2 P. W. 280; 3 B. P. C. 297; see *Cookson v. Bingham*, 3 D. M. & G. 668.

Thus a devise to A. and B. equally as joint tenants, and their several and respective heirs, gives joint estates for life with several inheritances. *Doe d. Littlewood v. Green*, 4 M. & W. 229.

A devise to several and their heirs respectively creates a tenancy in common. *Torret v. Frampton*, Styles, 434.

**Chap. XXVII.** It has been said, however, that a devise to several and their respective heirs creates joint estates for life and several inheritances. See *In re Tiverton Market Act*; *Ex parte Tanner*, 20 B. 374.

This rule, however, does not extend to personalty, so that a bequest of personalty to several, and to each of their respective heirs, executors and administrators, will create a tenancy in common. *Gordon v. Atkinson*, 1 De G. & S. 478.

A devise to several and the survivor and the heirs of such survivor gives joint life estates with a contingent remainder in fee to the survivor. *Vick v. Edwards*, 3 P. Wms. 371; *Re Harrison*, 3 Anst. 836; *Fearne*, C. R. 357—359.

But a devise to several and the survivor their heirs and assigns for ever gives joint estates in fee. *Doe v. Sotheran*, 2 B. & Ad. 628, 635.

C. What creates a tenancy in common.

The Court leans to a tenancy in common.

1. The Court leans towards a tenancy in common, and will prefer it, when there is a doubt, or the testator has given the legatees a choice between a joint tenancy and tenancy in common. *Booth v. Alington*, 3 Jur. N. S. 835; 27 L. J. Ch. 117; 5 W. R. 811; *Oakley v. Wood*, 16 L. T. N. S. 450; 37 L. J. Ch. 28.

Jointly and equally.

So in several cases where there have been such words as "jointly and equally" the Courts have held the gift a tenancy in common. *Ettricke v. Ettricke*, Amb. 656; *Perkins v. Baynton*, 1 B. C. C. 118.

What words create a tenancy in common.

2. Words of division or distribution, such as "to be divided," or "equally," or "between," or "amongst," or "respectively," make a tenancy in common. *Vanderplank v. King*, 3 Ha. 1; *Campbell v. Campbell*, 4 B. C. C. 15; *A.-G. v. Fletcher*, 13 Eq. 128. See *Re Moore's Settlement Trusts*, 10 W. R. 315.

Part or share.

And the use of the word "share," or similar words, with reference to the interest of the legatees, or even the word "participate," has the same effect. *Ive v. King*, 16 B. 46; *Paterson v. Rolland*, 28 B. 347; *Robertson v. Fraser*, 6 Ch. 696. See *Alloway v. Alloway*, 4 D. & War. 380; *Jones v. Jones*, 29 W. R. 786.

Effect of a

3. And it has been held, that where there is a gift to a class

at twenty-one, so that some may take vested and others contingent interests, they take as tenants in common. *Woodgate v. Unwin*, 4 Sim. 129; *Hand v. North*, 12 W. R. 229; 10 Jur. N. S. 7. Chap. XXVII.  
gift at twenty-one.

4. If there are any incidents attached to the gift inconsistent with a joint tenancy, it will be construed as a tenancy in common: Incidents inconsistent with a joint tenancy.

If, for instance, one of the objects of the gift is to take the interest of the other, not merely on the death of the latter, but on his death without issue, or on some other contingency. *Ryves v. Ryves*, 11 Eq. 539.

Of course a gift over of the interest of one joint tenant in certain events to a third person can have no such effect. *Edwards v. Jones*, 33 B. 348; see *Yarrow v. Knightly*, 8 Ch. D. 736.

5. Where there is a power to appoint to persons, which would authorise a tenancy in common, the Court, if compelled to exercise the power, will make the legatees tenants in common. Power to appoint to persons as tenants in common.  
*White's Trusts*, Joh. 656; *Phene's Trusts*, 5 Eq. 346; *In re Susanni's Trusts*, 47 L. J. Ch. 65; *Wilson v. Duguid*, 24 Ch. D. 244; see *Armstrong v. Armstrong*, 7 Eq. 519.

6. It would seem, that where a clear executory trust is created by will, for instance, by a direction to make a settlement upon a person and her children, the children would take as tenants in common. Executory trust in favour of a parent and children.  
*Head v. Randall*, 2 Y. & C. C. 231; *Stanley v. Jackman*, 23 B. 450. See *Taggart v. Taggart*, 1 Sch. & L. 84; *Synge v. Hales*, 2 Ba. & Be. 499.

At any rate, this is clearly the case if the ordinary powers and trusts are directed to be inserted in the settlement. *Mayn v. Mayn*, 5 Eq. 150.

But a mere direction to secure a fund in favour of a class will not make them tenants in common. *White v. Briggs*, 2 Ph. 583; *Owen v. Penny*, 14 Jur. 359.

7. If there is a gift to parents creating a tenancy in common, and children are substituted for parents dying, the children of each parent take as joint tenants among themselves. Issue substituted for parents take as joint tenants between themselves,  
*Penny v. Clarke*, 1 D. F. & J. 425; *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Hodgson's Trusts*, 1 K. & J. 178; *Coe v. Bigg*, 1 N. R. 536; *Lanphier v. Buck*, 2 Dr. & Sm. 484.

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unless there  
are words of  
severance  
applicable to  
the issue.

Severance of  
joint tenancy  
as regards the  
share of issue  
substituted for  
their parent.

But this does not apply if the words of division must be applied to the children as well. *Lyon v. Coward*, 15 Sim. 287; *Shepherdson v. Dale*, 12 Jur. N. S. 156; *Hodges v. Grant*, 4 Eq. 140.

8. If there is a gift to parents in joint tenancy and a direction, that the children of parents dying are to stand in the place of the parents and take their shares, there is with regard to the *stirps* of children so taking a severance of the joint tenancy. *Heasman v. Pearse*, 7 Ch. 275.

#### D. Tenants by entireties.

Tenants by  
entireties.

Where real or personal property is given to a husband and wife, though with a declaration that they are to be joint tenants, they hold by entireties, and on the death of one the other takes not *jure accrescendi*, but by virtue of the original limitation. Co. Lit. 187 a; *Kelly v. Pollock*, 6 Ir. C. L. 367.

Real estate.

In the case of real estate held by entireties, neither husband nor wife can alienate the property without the consent of the other, nor sever the tenancy. Co. Lit. 187 a, b; *Doe v. Parratt*, 5 T. R. 652.

Personalty.

In the case of personalty the right of the wife is destroyed, if the husband reduces the property into possession, and the wife has no equity to a settlement. *Atcheson v. Atcheson*, 11 B. 485; *Ward v. Ward*, 14 Ch. D. 506; *In re Bryan*; *Godfrey v. Bryan*, 14 Ch. D. 516.

It would seem, however, that the Court would preserve the wife's right by survivorship by preventing the husband from alienating the property during her life. *Atcheson v. Atcheson*, 11 B. 485.

Chattels real.

In the case of chattels real held by entireties, the husband can destroy his wife's right by survivorship by alienating the chattels real. In the report of the case of *Grute v. Locroft*, Cro. El. 287, usually cited as an authority on this question, the tenancy is stated to have been joint and not by entireties. It may have been a joint tenancy created before marriage. See 2 Preston, Abst. 57; Foster on Joint Ownership, 62.

## CHAPTER XXVIII.

## ESTATES IN FEE AND IN TAIL.

## I. WORDS OF LIMITATION PROPER TO PASS THE FEE.

1. WORDS of limitation were never necessary to pass the fee in a devise of lands held in ancient demesne. *Winch.* 1. Chap.  
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A devise to a man and his heirs gives him the fee, though he may be a bastard, and can have, therefore, only heirs of his body. *Idle v. Cook*, 1 P. Wms. 78. Devise to A.  
and his heirs.

A devise to A. and his lawful heirs carries a fee. *Simpson v. Ashworth*, 6 B. 412; *Matthews v. Gardiner*, 17 B. 254. Devise to A.  
and his lawful  
heirs.

So, too, a devise to a man, his executors and administrators, gives him the fee. *Rose d. Vere v. Hill*, 3 Burr. 1881. Devise to A.,  
his executors  
and adminis-  
trators.

A devise of gavelkind land to a man and his eldest heir passes the fee. *Co. Lit.* 27 a.

2. The testator may, however, show by explanatory expressions that he used the word heirs as equivalent to heirs of the body. *Doe d. Jearrod v. Banister*, 7 M. & W. 292; *Jenkins v. Hughes*, 8 H. L. 571; see, too, 4 Mad. 67; *Biddulph v. Lees*, E. B. & E. 289; 6 W. R. 592; 7 W. R. 309. The testator  
may show  
that he meant  
by heirs heirs  
of the body.

A devise to the first and other sons of a tenant for life successively and their respective heirs according to priority of birth, followed by a gift over in default of such issue, will give the sons successive estates tail. *Hennessey v. Bray*, 33 B. 96; *Lewis d. Ormond v. Waters*, 6 East, 337.

3. Heirs will be held equivalent to heirs of the body, if there is a limitation over in default of heirs to a person who may be, or to several persons, some of whom may be collateral heir or heirs to the first taker, the limitation over to a collateral heir Effect of gift  
over in default  
of heirs to a  
collateral heir.

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showing that by heirs the testator meant heirs of the body. *Webb v. Hearing*, Cro. Jac. 415; *Harris v. Davis*, 1 Coll. 416.

The rule does not apply where the gift over is on failure of issue; therefore, a gift to several in fee, and if they die without issue to a collateral heir will, since the Wills Act, give a fee with an executory devise over, as it would before the Act have given an estate tail by force of the gift over being in default of issue, not because it was to a collateral heir. See *Gwynne v. Berry*, 1 R. 9 C. L. 494; *Fay v. Fay*, 5 L. R. Ir. 274.

Effect of a gift  
over in default  
of issue upon  
a prior devise  
in fee.

4. If there is a devise to A., which gives A. the fee, either by express limitation or by construction, followed by a gift over if he dies without heirs of the body or issue, if these words import an indefinite failure of issue, A.'s estate is cut down to an estate tail. *Tracy v. Glover*, cit. 3 Leon. 130; *Denn v. Slater*, 5 T. R. 335; *Dansey v. Griffiths*, 4 Mau. & S. 61; *Tenny v. Agar*, 12 East, 253; *Morgan v. Morgan*, 10 Eq. 99; see *Bowen v. Lewis*, 9 App. C. 890.

If, however, the failure of issue is not an indefinite failure of issue, there is no necessity for this construction, and the gift over will take effect as an executory devise. *Right v. Day*, 16 East, 67; *Doe v. Frost*, 3 B. & Ald. 546; *Parker v. Birks*, 1 K. & J. 156; *Ex parte Davies*, 2 Sim. N. S. 114; *Blinston v. Warburton*, 2 K. & J. 400; *McEnally v. Wetherall*, 15 Ir. C. L. 502; *Coltsman v. Coltsman*, L. R. 3 H. L. 121.

It appears that in a deed a limitation over upon death without such issue or without leaving issue will not cut down a previous limitation in fee to an estate tail. *Idle v. Cook*, 1 P. Wms. 70; *Olivant v. Wright*, 9 Ch. D. 646; see *Morgan v. Morgan*, 10 Eq. 99.

Words of limitation appear to be unnecessary even in a deed, to pass the absolute interest in an estate *pur autre vie*. *Brenan v. Boyne*, 16 Ir. Ch. 87.

In a devise to A., her heirs and assigns for life and after her death without issue over the words for life, were rejected as inconsistent. *Wood v. Ainley*, W. N. 1884, 133.

## II. WHERE THE FEE WILL PASS WITHOUT WORDS OF LIMITATION.

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### A. Wills before the Wills Act.

In wills before the Wills Act a devise of lands to A. without words of limitation gave only an estate for life. But the Courts are anxious to lay hold of any indication of intention, that more than a life estate was meant to pass.

In what case  
a fee passes  
without words  
of limitation  
in wills before  
the Wills Act.

The words "freely to be possessed and enjoyed" will not pass the fee. *Doe d. Ashby v. Baines*, 2 C. M. & R. 23.

1. But the fee passes by the words property or estate, even if accompanied by words of locality. *Doe d. Pottow v. Fricker*, 6 Ex. 510; *Bentley v. Oldfield*, 19 B. 225; *Phillips v. Allen*, 7 Sim. 446; *White v. Coram*, 3 K. & J. 652; *Coltsman v. Coltsman*, L. R. 3 H. L. 121; see *Bowen v. Lewis*, 9 App. C. 890.

Devise of  
property or  
estate,

A mere recital, however, of an intention to dispose of all the testator's estates or property is not enough to pass the fee, unless these words are brought down into and incorporated with the devise. *Denn v. Gaskin*, 2 Cowp. 657; *Doe v. Allen*, 8 T. R. 497.

2. So, too, the fee passes by the words moiety, part, share, or similar words. *Doe d. Atkinson v. Fawcett*, 3 C. B. 274; *Paris v. Miller*, 5 Mau. & S. 408; *Manning v. Taylor*, L. R. 1 Ex. 235.

moiety, part,  
or share.

But the moiety, part, or share must exist as such at the date of the devise. *Colclough v. Colclough*, 1 R. 4 Eq. 263.

The rule does not apply to the case of a series of formal limitations, so as to affect one gift in the midst of several life estates. *Re Arnold's Estate*, 33 B. 163.

3. A fee passes, if there is a charge on the devisee personally, or in respect of the property devised, whether the charge be a sum in gross or an annual sum. *Matthews v. Windross*, 2 K. & J. 406; *Pickwell v. Spencer*, L. R. 6 Ex. 190; *ib.*, 7 Ex. 105.

Effect of a  
charge upon  
the devisee.

It is immaterial, whether the payment is upon a contingency or not. *Doe d. Thorne v. Phillips*, 3 B. & Ad. 753; *Abrams v. Winshup*, 3 Russ. 350.

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And a fee has been held to pass, where a mere discretionary trust was imposed upon the devisee. *Lloyd v. Jackson*, L. R. 1 Q. B. 571; *ib.*, 2 Q. B. 269.

But the fee will not pass, if sums are merely charged upon the land generally and not upon the land in the hands of the devisee; thus a devise after or subject to certain payments will not carry the fee. *Moor v. Denn d. Mellor*, 1 B. & P. 558; 2 B. & P. 247; *Doe d. Sams v. Garlick*, 14 M. & W. 698; *Vick v. Sueter*, 3 E. & B. 219; *Burton v. Power*, 3 K. & J. 170.

And where there is a devise subject to a charge on the devisee without words of limitation, and another devise in exactly the same words not subject to a charge, the latter will not carry the fee. *Right d. Compton v. Compton*, 9 East, 267; *Morris v. Lloyd*, 33 L. J. Ex. 202.

An express estate for life will of course not be enlarged by a charge. *Willis v. Lucas*, 1 P. Wms. 472; *Doe d. Burdett v. Wrighte*, 2 B. & A. 710.

Nor will an indefinite devise, if it appears from the will that only a life estate was meant to be given. *Bolton v. Bolton*, L. R. 5 Ex. 145.

Gift over  
inconsistent  
with a life  
estate.

4. A fee passes, if the land is given over in a manner inconsistent with a life estate.

a. Thus a fee is implied from a devise over upon death of the devisee under twenty-one, or at any other specified time. *Doe v. Cundall*, 9 East, 400; *Frogmorton v. Holiday*, 3 Burr. 1618; 1 W. Bl. 535; *Re English*, 2 Ir. Com. L. 284; *Burke v. Annis*, 11 Ha. 232.

b. A fee is also implied, if the gift over is upon death before a certain age and without issue living at the death. *Toovey v. Bassett*, 10 East, 460; *In re Harrison's Estate*, L. R. 5 Ch. 408. See *Claridge v. Arnold*, W. N. 1880, 141; *Yarrow v. Knightly*, 8 Ch. D. 736.

It makes no difference whether the devise is vested or contingent. *In re Harrison's Estate*, *supra*.

Effect on a  
devise to  
children of a  
gift over if the  
parent dies  
without  
children.

c. It seems doubtful whether, where there is an indefinite devise to children, a mere gift over, if the parent dies without such issue, will give the children the fee. See *Doe d. Cannon v. Rucastle*, 8 C. B. 876.

But if the fee is then expressly given over, it seems the children would also take the fee. *Robinson v. Gray*, 9 East, 1; *Hutchinson v. Stephens*, 1 Kee. 240; see, too, *Re Pollard's Trusts*, 3 D. J. & S. 541. Chap. XXVIII.

5. A devise of rents and profits or of the income of lands carried an estate for life in the lands before the Wills Act, and since the Act it carries the fee. *Manno v. Greener*, 14 Eq. 456. Devise of rents and profits carries the fee.

The same is the case with a devise of rents and profits for a time that may last for ever. *Bunbury v. Doran*, I. R. 9 C. L. 284.

But a devise of a specific annual sum out of land, though it happens to be the whole amount of the rents and profits, will not carry the land. *Going v. Hanlon*, I. R. 4 C. L. 144.

6. Where property is excepted out of a devise in fee, the exception will carry as large an interest as the devise out of which it is excepted. *Doe d. Knott v. Lawton*, 4 Bing. N. C. 455; 6 Sc. 303; *Hill v. Rattey*, 2 J. & H. 634; *Bennett v. Bennett*, 2 Dr. & Sm. 266. Exception carries as large an estate as the property out of which it is excepted.

7. The estate of a *cestui que trust* is commensurate with that of his trustee, and therefore, where land is devised to a trustee and his heirs in trust for a person without words of limitation, the latter takes the fee. *Moore v. Cleghorn*, 10 B. 423; 16 L. J. Ch. 469; 17 *ib.*, 400; *Knight v. Selby*, 3 Sc. N. R. 409; 3 M. & Gr. 92; *Challenger v. Shepherd*, 8 T. R. 597; *Smith v. Smith*, 11 C. B. N. S. 121. The estate of a cestui que trust is commensurate with that of the trustee.

So under a devise to trustees in fee upon trust for a life tenant with remainder in trust for a class without words of limitation, the remaindermen take the fee. *Knight v. Selby*, 3 Sc. N. R. 409; 3 M. & Gr. 92; *Maden v. Taylor*, 45 L. J. Ch. 569.

The fact that there are executory gifts over does not prevent the application of the rule, so far as the gifts over do not take effect. *Yarrow v. Knightly*, 8 Ch. D. 736.

The above rule does not apply, where the trustees take for the benefit of ulterior devisees as well. *In re Pollard's Estate*, 3 D. J. & S. 541; see *Sherwin v. Kenny*, 16 Ir. Ch. 138; *Blackhall v. Gibson*, 4 L. R. Ir. 49.

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Effect of the  
Wills Act in  
passing the  
fee.

B. Now, by the 28th section of the Wills Act, a devise without words of limitation passes the fee or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention shall appear by the will.

The fact, that the will contains other devises with words of limitation, will not prevent a devise without such words from passing the fee. *Wisden v. Wisden*, 2 Sm. & G. 396.

Nor will a power given to the devisee to appoint the property generally to her children cut a devise without words of limitation down to a life estate. *Brook v. Brook*, 3 Sm. & G. 280.

Contrary  
intention.

But a devise without words of limitation, followed by a devise of the same property to another person with words of limitation, will give the first devisee a life interest only. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

### III. WORDS OF LIMITATION PROPER TO PASS AN ESTATE TAIL.

Copyholds not being within the statute *de donis* are entailable only by custom. In the absence of custom a devise of copyholds in words which would create an estate tail in freeholds will give a fee simple conditional on the birth of issue. *Doe d. Blesard v. Simpson*, 3 M. & G. 929; *Hardcastle v. Dennison*, 10 C. B. N. S. 606.

What words  
create an  
estate tail.

A. The ordinary mode of limiting an estate tail is by the words "heirs of the body" or "issue."

And a devise to A. and his heirs male, or to A. and his heirs lawfully begotten, is an estate tail. *Baker v. Wall*, 1 Ld. Raym. 185; *Tufnell v. Borrell*, 20 Eq. 194; *Nanfan v. Legh*, 7 Taunt. 85; *Good v. Good*, 7 E. & B. 295.

In the case of a deed such words pass a fee. Co. Lit. sec. 31.

Effect of  
superadded  
words of limi-  
tation and  
distribution.

Words of limitation superadded to the words heirs of the body will not cut down the estate tail of the ancestor. *Denn d. Gearing v. Shenton*, Cowp. 410.

Nor will such words as "the elder son of the ancestor to be preferred to the second or younger son," as they merely indicate

the notion the testator incorrectly entertained of the descent of an estate tail. *Fetherston v. Fetherston*, 3 Cl. & F. 67.

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And probably a devise to A. and the heirs of his body as tenants in common would give A. an estate tail, notwithstanding *Doe d. Strong v. Goff*, 11 East, 668. See 2 Bl. 55, 58; 3 J. & Lat. 54.

But the heirs, where the word is to be used as a word of limitation, must be the heirs of the ancestor. Therefore a devise to the husband for life, with remainder to the heirs of the body of the husband and wife, will not give an estate tail, because no person can be supposed to include in himself the heirs of himself and somebody else. *Fearne*, C. R. 38; see, too, *Allgood v. Withers*, 2 Burr. 110.

To create an estate tail the inheritance must be limited to the heirs of the body of the ancestor.

But a devise to the husband and wife, with remainder to the heirs of the body of the husband and wife, gives them a joint estate tail. *Fearne*, C. R. 38.

A devise to husband and wife for life, with remainder to the heirs on the body of the wife by the husband to be begotten, vests in both an estate tail; but if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the wife alone has an estate tail, the word heirs in the latter case being considered as applied to the wife only. *Alpass v. Watkins*, 8 T. R. 516; *Denn v. Gillott*, 2 T. R. 431; *Frogmorton d. Robinson v. Wharrey*, 2 W. Bl. 728.

Distinction between heirs of the body of the wife and heirs on the body of the wife begotten.

Similarly, a devise to husband and wife for life, remainder to the heirs of the husband on the body of the wife begotten, gives the husband an estate in special tail. *Roe d. Aistrop v. Aistrop*, 2 W. Bl. 1228.

It follows that a devise to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, gives the wife no estate tail, because the heirs are not applied to her body. *Gossage v. Taylor*, Sty. 325.

Where there is a joint limitation for life to two persons who may by possibility intermarry (even though they may be respectively married already), with remainder to the heirs of their bodies, they take an estate tail. Co. Lit. 25 b. sec. 25.

Effect of limitation to the heirs of the body of several ancestors who may intermarry.

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So, too, a devise to a man and the heirs of his body by a second wife gives him an estate tail executed in possession, though the devisee had a wife at the time. *Fearne*, 35. Vent. 228.

Tenant in tail  
after possibi-  
lity of issue  
extinct.

And a devise to the wife for life, with remainder to the heirs of her body by the testator, where the testator has no issue by his wife, nevertheless makes the wife tenant in tail after possibility of issue extinct. *Platt v. Powles*, 2 Mau. & S. 65.

Devise to a  
man or the  
heirs of his  
body.

A devise to a man or the heirs of his body is an estate tail. *Parkin v. Knight*, 15 Sim. 83; *Wright v. Wright*, 1 Ves. sen. 409; *Harris v. Davis*, 1 Coll. 416; *Greenway v. Greenway*, 2 D. F. & J. 128.

Construction  
of a devise to  
a man or his  
heirs.

And a similar construction has sometimes been placed upon a devise to A. or his heirs, both before and since the Wills Act. See *Read v. Snell*, 2 Atk. 642, p. 645; *Lachlan v. Reynolds*, 9 Ha. 797; *Adshead v. Willetts*, 29 B. 358.

Such a devise would, however, probably now be held to be substitutional in wills since the Wills Act, as it is no longer necessary to change "or" into "and," in order to give the devisee the fee. *Wingfield v. Wingfield*, 9 Ch. D. 658. See *Parsons v. Parsons*, 8 Eq. 260.

B. In some cases the word heir has been held equivalent to heir of the body, where there has been a direction, that the land shall descend to the heirs; as, for instance, where there was a devise to A. for life, and then to descend to his female heir, whether sister or daughter. *Lewthwaite v. Thompson*, 36 L. T. N. S. 910; *Fay v. Fay*, 5 L. R. Ir. 274.

Construction  
of devises to a  
man and his  
issue.

C. With regard to realty, "the word issue in a will *primâ facie* means the same thing as heirs of the body, and is to be construed as a word of limitation." Per Parke, B., in *Slater v. Dangerfield*, 15 M. & W. 263.

Thus a devise to A. and his issue, or to several and their issue, as tenants in common, would, it seems, give estates tail. *Martin v. Swannell*, 2 B. 249; *Beaver v. Nowell*, 25 B. 551; *Campbell v. Bouskell*, 27 B. 325.

A devise to A. and his issue living at his death has been held to give an estate tail. *University of Oxford v. Clifton*, 1 Ed. 473.

A devise to A. and his issue, and the heirs of such issue, with a gift over in default of issue, before the Wills Act, has the same effect. *Franklin v. Lay*, 6 Mod. 258; 2 Bl. 59 n. Chap. XXVIII.

But a devise to A. and his issue as tenants in common, if more than one, the tenancy in common being applied to the issue only, or to A. and his issue to be divided among them as A. should appoint, where there are words to carry the fee, gives A. an estate for life, with remainder to his issue in fee. *Doe d. Gilman v. Elvey*, 4 East, 313; *Hockley v. Mawbey*, 1 Ves. jun. 142. In *Doe d. Davy v. Burnsall*, 6 T. R. 30; 1 B. & P. 215, the word issue was explained to mean children by the gift over, if such issue died without issue.

And a devise to several and their issue and their heirs as tenants in common gives an estate tail, according to the rule in *Wild's Case* (post), if there are no issue at the date of the devise. *Underhill v. Roden*, 2 Ch. D. 494; Co. Lit. 9 a. See *Cancellor v. Cancellor*, 11 W. R. 16. The rule in *Wild's Case* applies to a limitation to a man and his issue in fee as tenants in common.

#### IV. WORDS OCCASIONALLY USED AS WORDS OF LIMITATION.

A. The words son and child may be used as words of limitation, if the testator has clearly shown his intention so to use them. "If the word son be not used as a *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail." *Mellish v. Mellish*, 2 B. & C. 520. Words son and child used as words of limitation.

Thus, if the devise is to A., and if he dies not having a son over, A. takes an estate tail in a case before the Wills Act. *Bifield's Case*, cited 1 Vent. 231; S. C. *sub nom.*; *Milliner v. Robinson*, 1 Moore, 682, pl. 939.

The same is the case if the devise be to A. for life, and then to his son if he has one, and in default of such issue over. *Robinson v. Robinson*, 1 Burr. 38; 2 Ves. sen. 225; 3 Atk. 736; *Mellish v. Mellish*, 2 B. & Cr. 520; *Doe d. Garrod v.*

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*Garrod*, 2 B. & Ad. 87; *Murphy v. Johnston*, 6 Ir. Ch. 230; *Bell v. Bell*, 15 Ir. Ch. 517; *Andrew v. Andrew*, 1 Ch. D: 410; see *Bowen v. Lewis*, 9 App. C. 890.

But a devise to A. for life, and then to such son as she may leave, and his heirs and assigns, goes to all the sons of A. as joint tenants. *Beauchant v. Usticke*, W. N. 1880, 14.

Eldest son.

B. The term "eldest son" is less susceptible of a collective meaning than son or child. But it will receive this meaning if the intention is clear. *Doe d. Burrin v. Chorlton*, 1 Scott N. R. 290; 1 M. & Gr. 429; *Lewis v. Puxley*, 16 M. & W. 733; *Cleary's Trust*, 16 Ir. Ch. 438; *In re Childe*; *Childe-Pemberton v. Childe*, W. N. 1883, 48.

As between  
an estate tail  
in the father  
or son the  
Court prefers  
the former.

And if the devise is to A. for life, then to his eldest son for life, and so on to the eldest son of the family, an estate tail in remainder will be given to A., and not to his eldest son, so as to take in the largest number of descendants. *Forsbrooke v. Forsbrooke*, L. R. 3 Ch. 93.

C. In the same way the word children may be a word of limitation.

Children used  
as a word of  
limitation.

1. Thus a devise to A. to hold to him and his children for ever, or to A. and his children for ever, or to A. and his children lawfully begotten for ever, gives A. an estate tail. *Davis v. Stevens*, Dougl. 321; *Broadhurst v. Morris*, 2 B. & Ad. 1; *Wood v. Baron*, 1 East, 259; *Roper v. Roper*, L. R. 3 C. P. 32; 36 L. J. C. P. 27; 37 *ib.* 7. See, too, *Doe d. Gigg v. Bradley*, 16 East, 399.

In such cases children would seem to be a word of limitation quite independently of the so-called rule in *Wild's Case*, 6 Rep. 17.

Devise to A.  
and  
children in  
succession.

So a devise of all the testator's *property* to A. and his children in succession gives A. an estate tail. *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613; see *Snowball v. Proctor*, 2 Y. & C. C. 478.

Rule in  
*Wild's Case*.

2. A simple devise to A. and his children, where A. has no children at the time of the devise, gives him an estate tail. *Wild's Case*, 6 Co. Rep. 17; *Clifford v. Koe*, 5 App. C. 447.

And for this purpose a child *en ventre* at the date of the

will is considered as non-existent. *Roper v. Roper*, L. R. 3 C. P. 32.

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The rule applies, though the testator may expressly give the parent a power of appointing the property in question among his children. *Seale v. Barter*, 2 B. & P. 485; *Clifford v. Brooke*, I. R. 10 C. L. 179; 2 L. R. Ir. 184; S. C. nom. *Clifford v. Koe*, 5 App. C. 447. See *In re Moyle's Estate*, 1 L. R. Ir. 155.

Power to appoint the property to children is not inconsistent with an estate tail.

3. There may, however, be an intention shown that the parent was not to take an estate tail. Exceptions.

Thus, in *Buffar v. Bradford*, 2 Atk. 220, the testator showed that he contemplated the mother and children as taking joint interests at a period subsequent to his death. And in *Grieve v. Grieve*, 4 Eq. 180, where there was a devise of a house to the testator's nieces and their children, and if they have not any over, a direction that the furniture was to go with the house was held sufficient to show that an estate tail could not have been intended.

4. If there are any children living at the time of the devise, the term children is *prima facie* not a word of limitation. *Byng v. Byng*, 10 H. L. 171; *Oates v. Jackson*, 2 Str. 1172; *Jeffery v. Honywood*, 4 Mad. 398.

If there are children living at the date of the devise children is *prima facie* not a word of limitation. Contrary intention.

But this rule bends to evidence of a contrary intention; thus, a direction that certain things are to go as heirlooms with the estate, is sufficient to rebut a joint tenancy, and to show that an estate tail was intended to be given. *Byng v. Byng*, 10 H. L. 171.

By analogy to the rule in *Wild's Case* a devise to A. and his sons in tail male, and for want of such issue male over, where A. has no sons, gives him an estate tail. *Wharton v. Gresham* 2 W. Bl. 1083; see *Sparling v. Parker*, 29 B. 450.

A devise to A. and B. as tenants in common, and in their respective proportions to their children, or according to their wills, gives the fee to A. and B. with an executory devise at the death of each to his children or devisees. *Re Buckmaster's Estate*, 47 L. T. 514.

The rule in *Wild's Case* does not apply to personality. *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226.

The rule in *Wild's Case* does not apply to personality.

## V. THE RULE IN SHELLEY'S CASE.

The construction of devises to heirs and heirs of the body, after a prior estate of freehold in the ancestor, is governed by the so-called rule in *Shelley's Case*.

The rule in  
*Shelley's Case*  
stated.

It may be laid down generally, that where the ancestor by any will takes an estate of freehold, whether by implication or direct limitation, and whether it may or may not determine in his lifetime, and in the same will an estate is limited by way of remainder, either mediately or immediately, to his heirs in fee or in tail, that always in such case the heirs are words of limitation of the estate and not words of purchase, and therefore the ancestor takes an estate in fee or in tail as the case may be. *Shelley's Case*, 1 Co. 93b.; *Fearne*, C. R. 33, 40; *Pybus v. Mitford*, 1 Ventr. 372; *Curtis v. Price*, 12 Ves. 99.

The two limitations must be in the same instrument, but the Court considers a will and codicils for this purpose as one instrument. *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698.

The rule applies equally to limitations of freehold and copyhold estates, and to estates *pur autre vie*. *Doe d. Jeff v. Robinson*, 8 B. & Cr. 296; 2 M. & Ryl. 249; see 2 D. & War. 327; *Crozier v. Crozier*, 3 D. & War. 373.

It applies to limitations, which are both legal or both equitable, even where the first is for the separate use of a married woman. *Spence v. Spence*, 12 C. B. N. S. 199; *Fearne*, C. R. 56; *Pitt v. Jackson*, 2 B. C. C. 51.

It does not apply to cases, where one limitation is legal and the other equitable. *Right v. Creber*, 5 B. & C. 866; *Collier v. McBean*, 34 L. J. Ch. 555.

The rule does not apply so as to destroy intermediate contingent limitations by merger, even in cases before 8 & 9 Vict. c. 106. *Lewis Bowles' Case*, 11 Rep. 80; *Fearne*, C. R. 36.

Nor does it apply where the estate to the heir is limited, not by way of remainder simply, but as a conditional limitation or as an alternative contingent remainder. *Lloyd v. Carew*, Prec. Ch. 72; *Show P. C.* 137; see *Fearne*, 275; *Plunket v. Holmes*, 1 Lev. 11; *Raym.* 28; *Fearne*, 341; *Crofts v. Middleton*, 2

K. & J. 194; 8 D. M. & G. 192; see *In re White & Hindle's Contract*, 7 Ch. D. 201.

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The rules of construction with reference to cases coming within the operation of the rule in *Shelley's Case* are settled by the leading cases of *Jesson v. Wright*, 2 Bl. 1, and *Roddy v. Fitzgerald*, 6 H. L. 823.

Application of the rule where the limitation is to the heirs or the heirs of the body of the ancestor.

A. Where the words heirs or heirs of the body are used in the limitation of the inheritance the rule applies—

1. Although the limitation of the freehold to the ancestor may be followed by words clearly indicating an intention that his estate is to be for life only.

Thus, it is immaterial, that the estate of the ancestor may be declared to be "for life and no longer:" *Roe d. Thong v. Bedford*, 4 Mau. & S. 362; 1 B. C. C. 313; *Robinson v. Robinson*, 1 Burr. 38; 3 B. P. C. 180; 2 Ves. sen. 225; *Macnamara v. Dillon*, 11 L. R. Ir. 29; that he is made unimpeachable for waste: *Jones v. Morgan*, 1 B. C. C. 206; *Bennett v. Earl of Tankerville*, 19 Ves. 170; that powers are expressly given him which would be implied if he were tenant in tail, such as powers to jointure and make leases: *Baile v. Coleman*, 2 Vern. 668; *Jones v. Morgan*, 1 B. C. C. 206; *Broughton v. Langley*, 2 Ld. Raym. 873; that his estate is made subject to the obligation of keeping the buildings in repair: *Jesson v. Wright*, 2 Bligh, 1; that there is a restraint upon alienation for longer than his life: *Perrin v. Blake*, 1 W. Bl. 672; *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698; that, where there is no executory trust, there is a declaration that special care should be taken that it should never be in the power of the ancestor to dock the entail: *Leonard v. Earl of Sussex*, 2 Vern. 526; and that there is a limitation to trustees to preserve contingent remainders. *Wright v. Pearson*, Amb. 358; 1 Ed. 119.

Restrictions upon the estate of the ancestor are immaterial.

2. The rule applies, where words of limitation are superadded to the limitation to the heirs or heirs of the body, provided such words are not inconsistent with the nature of the descent pointed out by the first words, for such words may be looked upon as an explanation of what the testator supposed to be the course of the descent under an estate tail, and *expressio eorum quæ tacite insunt nihil operatur*.

Words of limitation superadded to the word heirs will not make it a word of purchase.

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Thus words limiting the estate of the heirs to a life estate, or to a life estate without power to sell or dispose, will be rejected. *Doe d. Elton v. Stenlake*, 12 East, 515; *Hugo v. Williams*, 14 Eq. 224; *Hayes v. Foorde*, 2 W. Bl. 698.

The same will be the case with words of limitation in fee or in tail, superadded to the word heirs or heirs of the body.

Thus a limitation to the heirs of the body of the ancestor and their heirs, or their heirs, executors, administrators, and assigns for ever (a); or to the heirs male of the body of the ancestor, and their issue (b); or to the heirs male of his body in tail, in strict settlement (c); or to the heirs male of his body, and the heirs male of the body of every such heir male severally and successively as they should be in priority of birth, every elder, and the heirs male of his body, to be preferred to every younger (d), will not avail to give the heirs an estate by purchase. *Morris d. Andrews v. Le Gay*, cited 2 Burr. 1103, and 8 T. R. 518; *Kinch v. Ward*, 2 S. & St. 409; *Measure v. Gee*, 5 B. & Ald. 910; *Nash v. Coates*, 3 B. & Ad. 839 (a); *Minshull v. Minshull*, 1 Atk. 411 (b); *Douglas v. Congreve*, 1 B. 59 (c); *Legatt v. Sewell*, 1 Eq. Abr. 395, p. 7; 1 P. Wms. 37; see *Fearne*, 159, 160; see *Fetherston v. Fetherston*, 3 Cl. & F. 67; 9 Bl. 237 (d).

Words of  
distribution  
superadded.

3. Words of distribution following the limitation of the inheritance will not prevent the application of the rule, "for it does not follow that the testator did not intend that heirs of the body should take because they could not take in the mode prescribed."

Thus a declaration that the heirs are to take as tenants in common, and not as joint tenants (a); or equally among them, share and share alike (b); or in such shares and proportions as the ancestor should appoint (c); or "as well male as female," or "whether sons or daughters" as tenants in common (d), will not prevent the operation of the rule. *Doe d. Candler v. Smith*, 7 T. R. 531; *Bennett v. Earl of Tankerville*, 19 Ves. 170 (a); *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944 (b); *Jesson v. Wright*, 2 Bl. 1; see *Roddy v. Fitzgerald*, 6 H. L. 823; *Dunk v. Fenner*, 2 R. & M. 557 (c); *Doe d. Bosnall v. Harvey*, 4 B. & C. 610; *Pierson v. Vickers*, 5 East, 548 (d).

In such a case it make no difference that the lands are gavelkind. *Doe d. Bosnall v. Harvey*, *supra*, overruling *Doe v. Laming*, 2 Burr. 1100.

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Gavelkind  
lands.

The absence of a gift over in default of issue is immaterial. *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944.

4. Nor will words of distribution and limitation together, superadded to the limitation of the inheritance, prevent the operation of the rule.

Words of dis-  
tribution and  
limitation  
superadded.

It has sometimes been laid down that words of distribution and limitation together, superadded to the heirs, would make the latter a word of purchase, but the rule is now clearly settled, overruling *Gretton v. Haward*, 6 Taunt. 94; 2 Marsh. 9, and *Crump d. Woolley v. Norwood*, 7 Taunt. 362; 2 Marsh. 161; see *Anderson v. Anderson*, 30 Beav. 209; *Mills v. Seward*, 1 J. & H. 733; *Grimson v. Downing*, 4 Dr. 125; and see *Jordon v. Adams*, 9 C. B. N. S. 483.

Lord Chief Justice Cockburn, in the last cited case, p. 497, thus sums up the law with reference to the extent of the application of the rule in *Shelley's Case*, where the words heirs or heirs of the body are used: "No incident, superadded to the estate for life, however clearly showing that an estate for life merely, and not an estate of inheritance, was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration, however express or emphatic, of the deviser, can be allowed, either by inference or by force of express direction, to qualify or abridge the estate in fee or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs or the heirs of his body, the law inexorably converts the entire devise in favour of the ancestor."

The words heirs or heirs of the body will, however, be construed as words of purchase:

1. When words of limitation are superadded to them inconsistent with the nature of the descent pointed out by the first words, as where the limitation is to a man for life, and after his decease to the use of his heirs and the heirs female of their bodies. *Fearne*, C. R. 182; *Shelley's Case*, 1 Rep. fol. 88, 95 b.

Words of  
limitation  
inconsistent  
with the  
descent of an  
estate tail in  
the ancestor.

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There appears to be no other authority for this rule than the argument of counsel in *Shelley's Case*, cited with approbation by Fearne, C. R., p. 182. It has, however, been followed in a case where the word issue and not heir was used. See *Hamilton v. West*, 10 Ir. Eq. 75. In that case the devise was to Margaret for life, remainder to her issue female and the heirs of their bodies; and it was held that Margaret took only a life estate, with remainder to her daughters in tail general, and there seems no reason for supposing, that the same principle would not be applied, where the word heirs instead of issue is used. See *Dodds v. Dodds*, 10 Ir. Ch. 476; 11 *ib.* 374.

What is an  
inconsistent  
course of  
descent.

In the absence of authority it is doubtful, what amount of discrepancy between the two courses of descent, will justify the application of this rule. Fearne, C. R., p. 183, points out that "there does not appear to be the same inconsistency in construing the first words, which describe heirs special, to be words of limitation, where the superadded words extend to heirs general, as there is where the first words, and those engrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same person; in the latter case it is absolutely impossible, by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of limitation; whereas, in the former case, the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding; and then both may be satisfied, by taking the first as words of limitation." In *Hamilton v. West*, however, the question was between an estate in tail female in the ancestor and an estate in tail general to the daughters, the latter of which would, "in their general sense," have included the former; and it seems, therefore, that Fearne's remark must be taken with some modification.

The testator  
may interpret  
the sense in  
which he has  
used the word  
heirs.

2. Where the testator has, either by express words, or by implication, interpreted the meaning he intended to convey by the term heirs or heirs of the body, those words may be words of purchase.

In *Fetherston v. Fetherston*, 3 Cl. & F. 67, Lord Brougham lays down, "If there is a gift to A. and the heirs of his body, and then in continuation, the testator, referring to what he had said, plainly tells us that he used the word heirs of the body to denote A.'s first or other sons, then clearly the first taker would only take a life estate."

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However, the mere insertion of such words as, if more than one child, or, if only one child, then to such child, is not sufficient to show that the testator meant by heirs of the body, children. *Roddy v. Fitzgerald*, 6 H. L. 823; *Jesson v. Wright*, 2 Bl. 1.

Effect of the words "if more than one child, to such child."

And even if the words are, if there be but one *such* child, to such child, his or her heirs for ever, the term heirs of the body will not be held to mean children, if there are no words to carry the fee to them, except in the event of there being only one child. *Bridge v. Chapman*, Notes of Cases, L. J., July 10, 1875, 118; see *Ryan v. Cowley*, Ll. & G. temp. Sug. 7.

Effect of the words "if more than one such child," &c.

But in similar cases heirs of the body will be construed as children, if there are words giving them an estate in fee or in tail. *Goodtitle d. Sweet v. Herring*, 1 East, 264; *Gummoe v. Howes*, 23 B. 184. In *Poole v. Poole*, 3 B. & P. 620, this construction was rebutted by other limitations.

So, if the testator, after using the words heirs of the body, continues, "that is to say, the first, second, and other sons, etc." Express interpretation clause. *Lowe v. Davies*, 2 Ld. Raym. 1561.

Or again, the testator may explain his meaning by reference to other limitations. *Meredith v. Meredith*, 10 East, 503; *Doe d. Woodall v. Woodall*, 3 C. B. 349; *East v. Twyford*, 4 H. L. 517.

Interpretation by reference.

And the word heirs of the body, coupled with a reference to the ancestor, as their father, must mean children. *Jordan v. Adams*, 9 C. B. N. S. 483.

Reference to father.

B. The application of the rule in *Shelley's Case* is the same, where the words are first heirs male or heirs of the body who shall attain twenty-one. *Minshull v. Minshull*, 1 Atk. 411; *Toller v. Attwood*, 15 Q. B. 929.

First heirs male.

C. When the word heir is used in the singular, the rules of law are less stringent in uniting the limitation of the inheritance to the estate for life of the ancestor.

Limitation to the heir of the tenant for life.

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1. However, the word heir, in the singular, without words of limitation superadded, is a word of limitation and not of purchase, even when such words as "next" or "first" are added to it. *Blackburn v. Stables*, 2 V. & B. 367; *Burley's case*, cit. 1 Vent. 230; *Whiting v. Wilkins*, 1 Bulst. 219; *Richards v. Lady Bergavenny*, 2 Vern. 324; *White v. Collins*, Com. Rep. 289; *Dubber d. Trollope v. Trollope*, Amb. 453.

The fact that the limitation is to the heir for ever makes no difference. *Fuller v. Chamier*, L. R. 2 Eq. 682.

Words of  
limitation  
superadded to  
the word heir.

2. But words of limitation in fee or in tail, superadded to the word heir, make it a word of purchase. *Archer's case*, 1 Co. 66; *Fearne*, C. R. 150; *Clerke v. Day*, Moore, 593; *Willis v. Hiscox*, 4 M. & Cr. 197; *Greaves v. Simpson*, 12 W. R. 773; 10 Jur. N. S. 609.

And even a devise to A. to hold to him and the heir male of his body, and the heirs and assigns of such heir male for ever, followed by a gift over, if A. died without leaving any son of his body, has been held to give A. a life estate only. *Chamberlayne v. Chamberlayne*, 6 E. & B. 625.

3. Where the estate of the heir is expressed to be for life, inasmuch as he is not to have the inheritance, he cannot take as heir by descent. *White v. Collins*, Com. 289.

The rule in  
*Shelley's Case*  
applies where  
the limitation  
is to the issue  
of a tenant for  
life.

Distinction  
between the  
word issue  
and heirs.

D. The application of the rule in *Shelley's Case*, where the limitation is to the issue of the ancestor, who takes a prior estate of freehold:

"The authorities clearly show that, whatever be the *primâ facie* meaning of the word issue, it will yield to the intention of the testator to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression heirs of the body would do." *Per Alderson, B., Lees v. Mosley*, 1 Y. & C. Ex. 609.

This doctrine was questioned by Lord Wensleydale in *Roddy v. Fitzgerald*, 6 H. L. 882:—"I certainly feel a difficulty in figuring to myself, what precise sort of context would be sufficient to alter the sense of the word issue, which would not have the same effect, if the words used were the admitted technical words, heirs of the body." There can, however, be no doubt that words of modification will more readily convert the

word issue than the word heirs into a word of purchase, and the remark of Lord Wensleydale must be held to apply to cases where other words have interpreted the word issue to mean children. Thus:

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1. Words of distribution alone, superadded to the word issue, in cases where the issue would not take the inheritance, will not make it a word of purchase. *Doe d. Blandford v. Applin*, 4 T. R. 82; *Doe d. Cock v. Cooper*, 1 East, 229; *Roddy v. Fitzgerald*, 6 H. L. 823; *Colclough v. Colclough*, 1 R. 4 Eq. 263; *Woodhouse v. Herrick*, 1 K. & J. 352; *Blackhall v. Gibson*, 2 L. R. Ir. 49.

Words of  
distribution  
alone super-  
added in cases  
before the  
Wills Act.

This is clear, when there is a gift over upon an indefinite failure of issue; but it seems, that a gift over is immaterial, since, under the old law, the issue, if they took as purchasers, could only take for life, and therefore the testator's general intent to benefit all the issue would fail. See *per* Wood, V.-C., in *Kavanagh v. Morland*, Kay, 16, 27, where the same construction prevailed, although the gift over was in default of issue of the tenant for life living at his death; and this is in accordance with *Doe v. Rucastle*, 8 C. B. 876.

2. Words of limitation in fee or in tail, superadded to the word issue, where there is a limitation in default of issue in cases before the Wills Act, will not make it a word of purchase, provided they do not change the course of descent. *Roe d. Dodson v. Grew*, 2 Wils. 324; Wilm. 272; *Denn d. Webb v. Puckey*, 5 T. R. 299; *Frank v. Stovin*, 3 East. 548; *Griffiths v. Evan*, 5 B. 241.

Words of  
limitation  
superadded.

The same rule applies where the gift over is on failure of issue living at the death of the person, to whom the prior estate is limited, or on death of the issue under twenty one. *Warren v. Travers*, 1 R. 2 Eq. 455; see *Fetherston v. Fetherston*, 3 Cl. & F. 67; 9 Bl. 237. *Merest v. James*, 1 B. & B. 484; 4 J. B. Moo. 327, must be considered overruled.

And the absence of a gift over in default of issue will not convert issue into a word of purchase. *Williams v. Williams*, 51 L. T. 779; see, too, *Doe d. Cooper v. Collis*, 4 T. R. 294; and the remarks of Wood, V.-C., Kay, 16, 27; and see *Montgomery*

Effect of the  
absence of a  
gift over in  
default of  
issue.

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*v. Montgomery*, 3 J. & Lat. 47; *Morgan v. Thomas*, 8 Q. B. D. 575; 9 Q. B. D. 643.

3. If, however, the superadded words of limitation alter the course of descent, the issue will take as purchasers. *Hamilton v. West*, 10 Ir. Eq. 75; *Dodds v. Dodds*, 10 Ir. Ch. 476; 11 *ib.* 374, *ante*, pp. 315, 316.

Words of  
limitation and  
distribution  
superadded  
make issue  
a word of  
purchase.

4. Words of limitation in fee or in tail, and of distribution, superadded to the word issue, make it a word of purchase, whether there is a limitation over in default of issue or not. *Lees v. Mosley*, 1 Y. & C. Ex. 589; *Crozier v. Crozier*, 3 D. & War. 373; *Greenwood v. Rothwell*, 5 M. & Gr. 628; 6 Sc. N. R. 670; *Montgomery v. Montgomery*, 3 J. & Lat. 47; *Slater v. Dangerfield*, 15 M. & W. 263; *Colclough v. Colclough*, 1 R. 4 Eq. 263; *McKenna v. Eager*, 1 R. 9 C. L. 79; *Rotheram v. Rotheram*, 13 L. R. Ir. 429; *Shannon v. Good*, 15 L. R. Ir. 284.

It makes no difference, whether a fee be given to the issue by express words or by implication from a power of appointing to them. *Bradley v. Cartwright*, L. R. 2 C. P. 511.

But a power of appointing to issue, which would authorise an appointment in fee, will not make the word issue a word of purchase, where there is an express gift to issue as tenants in common without words giving them the fee. *Blackhall v. Gibson*, 2 L. R. Ir. 49.

Words of  
distribution  
superadded in  
cases since the  
Wills Act.

5. It may be noticed that, in wills coming under the operation of the Wills Act, a devise to A. for life, and after his death to his issue as tenants in common, will fall under the last head, since under such words the issue would take a fee.

Effect of a  
restraint upon  
alienation by  
the tenant for  
life and his  
issue or any of  
them.

6. In *King v. Burchell*, Amb. 379; 4 T. R. 296 *n*, a direction against alienation by the tenant for life and his issue, or any of them, was held to show that the word issue was used as a word of limitation. See, too, *Tate v. Clark*, 1 B. 100.

## CHAPTER XXIX.

## ESTATES OF TRUSTEES.

## I. IN WHAT CASES TRUSTEES TAKE THE LEGAL ESTATE.

THE appointment of certain persons as trustees of inheritance gives them the fee. *Trent v. Hanning*, 1 B. & P. N. R. 116; 7 East, 97; 10 Ves. 495; 1 Dow. 102. Chap. XXIX.  
Appointment  
of trustees of  
inheritance.

So the appointment of a person as executor, "so far as is necessary to the performance of the trusts relating to my real estate," gives the executor the fee. *Plenty v. West*, 6 C. B. 201; 16 B. 175; *Sidebotham v. Watson*, 11 Ha. 170.

If the land is devised to beneficiaries, and a share is directed to be divided on the death of a beneficiary, persons appointed to carry out all the intentions of the will, will take the legal estate, though the case may be different where a sale is only contemplated as possible. *Davies to Jones and Evans*, 24 Ch. D. 190; *L. & S. W. R. Co. v. Bridger*, 12 W. R. 948.

Where land is devised to three trustees, and the appointment of one of the trustees is revoked, and another is appointed in his place, the fee passes to the new trustee jointly with the two remaining trustees. *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 30 L. J. Ch. 144; 9 W. R. 174; 2 D. F. & J. 527. Appointment  
of new trus-  
tees by codicil.

A direction to executors to let the testator's lands, and out of the profits to pay two sums, followed by a gift of the rents of the land, gives the executors no estate beyond the period for accomplishing the purpose indicated. *Lambert v. Browne*, 1 R. 5 C. L. 218. See *Smith v. Smith*, 1 L. R. Ir. 206.

A direction to executors to pay annuities out of the testator's whole estate, which is disposed of after payment of the Direction to  
pay annuities  
out of realty.

Chap. XXIX. annuities, gives the executors the fee. *Doe v. Woodhouse*, 4 T. R. 89.

Effect of the Statute of Uses on devises to trustees.

A devise unto and to the use of A., in trust for B., gives A. the legal estate by analogy to the Statute of Uses; while, similarly, a devise to A., in trust for B., gives B. the legal estate. See *Cunliffe v. Brancker*, 3 Ch. D. 393.

In the latter case it makes no difference that the devise to the trustees is subject to payment of debts, if the duty of paying them is not imposed on the trustees. *Kenrick v. Lord Beauclerk*, 3 B. & P. 178; *Jones v. Lord Say*, 8 Vin. 262, pl. 19.

But the legal estate will remain in the trustees, if it is necessary for the performance of the trust imposed upon them.

Devise in trust to pay rents.

Thus, a devise to trustees and their heirs in trust to pay the rents to B. gives the trustees the legal estate. *Doe v. Homfray*, 6 A. & E. 206.

Devise to permit *cestui que trust* to receive rents.

But a devise to trustees to permit B. to receive the rents vests the legal estate in B. *Right d. Phillips v. Smith*, 12 East, 455; *Doe d. Noble v. Bolton*, 11 Ad. & E. 188.

Devise to pay to or permit *cestui que trust* to receive rents.

And, similarly, if the trust is to pay to or permit B. to receive the rents, the latter direction takes effect and the legal estate vests in B. *Doe v. Biggs*, 2 Taunt. 109; *Baker v. White*, 20 Eq. 166.

Net rents.

But if the beneficiaries are to receive only the net profits, the trustees take the legal estate. *Barker v. Greenwood*, 4 M. & W. 421.

Separate use.

If the trust is to permit a married woman to receive the rents to her separate use, the legal estate remains in the trustees. *Harton v. Harton*, 7 T. R. 652; *In re Hart's Estate*; *Orford v. Hart*, W. N. 1883, 164. But this principle does not apply to a deed. *Williams v. Waters*, 14 M. & W. 166.

Trustees to preserve contingent remainders.

If the trustees are to preserve contingent remainders during the life of the tenant for life, a trust to permit the latter to receive the rents will not give him the legal estate. *Biscoe v. Perkins*, 1 V. & B. 485.

Effect of a power to give receipts on the legal estate.

And it would seem, that a power to the trustees to give receipts would show that they were to receive the rents and pay them over to the beneficiaries, notwithstanding the trust is

to permit the beneficiaries to receive them. But a receipt Chap. XXIX.  
 clause will not have this effect if copyholds are given with the  
 freeholds, since it may be limited to the former, to which the  
 Statute of Uses does not apply. *Baker v. White*, 20 Eq. 166.

If the receipts of the beneficiary are to be with the approba-  
 tion of the trustees, they take the legal estate. *Gregory v.*  
*Henderson*, 4 Taunt. 772.

The fact that no sufficient estate is limited to support  
 contingent remainders will not prevent the uses from being  
 legal. *Cunliffe v. Brancker*, 3 Ch. D. 393.

If there is a devise in remainder to children who shall attain  
 twenty-one, a power of maintenance given to the trustees will  
 prevent the use in remainder from becoming legal. *Berry v.*  
*Berry*, 7 Ch. D. 657; *In re Tanqueray-Willaume and Landau*,  
 20 Ch. D. 465.

A devise to trustees upon trust to pay debts and legacies Trust to pay  
debts and  
legacies.  
 vests the legal estate in them at once, whether the personality  
 is sufficient for that purpose or not. *Murthwaite v. Jenkinson*,  
 2 B. & C. 357; 3 D. & Ry. 765.

On the other hand, if the trust is to pay the debts out of Trust to arise  
only if the  
personalty is  
insufficient.  
 the realty only if the personality proves deficient, the trustees  
 take the legal estate, only if the event happens. *Carlyon v.*  
*Truscott*, 20 Eq. 339. See *Doe d. Cadogan v. Ewart*, 7 A. &  
 E. 636.

If there is a general direction to pay debts whereby the debts  
 are charged upon the lands of the testator, followed by a devise  
 of the lands to trustees and their heirs to certain uses, the legal  
 estate remains in the trustees. *Houston v. Hughes*, 6 B. & C.  
 403; *Baker v. White*, 20 Eq. 166, 173.

The Statute of Uses does not apply to leaseholds for years or Leaseholds  
for years and  
copyholds are  
not within the  
Statute of  
Uses.  
 to copyholds, and therefore a devise of copyholds to A., in trust  
 for B., gives A. the legal estate. *Houston v. Hughes*, 6 B. & C.  
 403; *Baker v. White*, *supra*.

There is no so-called doctrine of attraction by which, where  
 freeholds and copyholds are given together, the legal estate in the  
 freeholds attracts the legal estate in the copyholds, or *vice versa*.  
*Baker v. White*, 20 Eq. 166; overruling *Baker v. Parson*, 42  
 L. J. Ch. 228.

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An appointment, under a power to appoint the use, vests the legal estate in the appointee. 2 Jarman, 307.

## II. THE QUANTITY OF THE ESTATE OF TRUSTEES.

As regards the quantity of the estate taken by the trustee, the same rules apply to copyholds, leaseholds, and freeholds. *Doe v. Barthrop*, 5 Taunt. 382; *Baker v. White*, 20 Eq. 166; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81; see *Wyman v. Carter*, 12 Eq. 309.

Devise in fee with power to sell or convey.

1. A devise to trustees and their heirs, with a general power to sell or convey, will give them the fee though some of the limitations might, in the absence of such a power, be legal. *Rackham v. Siddall*, 1 Mac. & G. 607; *Doe d. Shelley v. Edlin*, 4 A. & E. 582; *Bagshaw v. Spencer*, 1 Ves. sen. 142; 2 Atk. 570; *Watson v. Pearson*, 2 Ex. 581; *Blugrove v. Blagrove*, 4 Ex. 550; *Cropton v. Davies*, L. R. 4 C. P. 159.

Direction to transfer copyholds.

But in the case of copyholds, a direction that they are to be transferred does not require the legal estate. *Doe d. Player v. Nicholls*, 1 B. & C. 336.

And if the power of sale does not arise till after a life estate, the ordinary rule applies to ascertain whether the life estate is equitable or legal. *Doe d. Noble v. Bolton*, 11 A. & E. 188.

Devise enlarged to a fee by trust for sale.

And even, where the devise before the Wills Act would not have carried the fee, a trust to sell will give trustees the fee. *Doe d. Cadogan v. Ewart*, 7 Ad. & E. 636.

2. But though there may be words which will give the trustees a fee, their estate may be controlled if it can be shown what less estate will satisfy the trust.

Devise in fee till an infant attains twenty-one.

Thus, a devise to trustees and their heirs till an infant attains twenty-one, and then to the infant in fee, gives the trustees only a chattel interest. *Goodtitle v. Whitby*, 1 Burr. 228.

Devise in fee to preserve contingent remainders.

So, a devise in fee to trustees to preserve contingent remainders will be cut down to an estate for the life of the tenant for life, if there are no subsequent remainders to preserve. *Doe d. Compere v. Hicks*, 7 T. R. 433; *Haddelsey v. Adams*, 22 B. 266; *Saunders v. Eppe*, 9 W. R. 69.

If, however, there is a power of appointment under which

contingent remainders may be created, the estate of the trustees will not be cut down. *Venables v. Morris*, 7 T. R. 342, 437. Chap. XXIX.

This, however, only applies to trustees, especially inserted to preserve contingent remainders. *Doe v. Barthrop*, 5 Taunt. 382.

So a devise to trustees in fee, on trust to pay rents to A. for life, with remainder to B., gives them an estate for A.'s life only. *Playford v. Hoare*, 3 Y. & J. 175. Devise in fee to pay rents to A. for life with legal remainder over.

A *fortiori*, if the devise in remainder is an independent devise. *Adams v. Adams*, 6 Q. B. 860; *Cooke v. Blake*, 1 Ex. 220.

In a deed as a general rule a limitation to the use of trustees in fee will not be cut down to a smaller estate. *Cooper v. Kynock*, 7 Ch. 398.

However, it has been held that a limitation in fee to trustees to preserve contingent remainders will, even in a deed, be cut down to an estate *pur autre vie*, if there is a subsequent limitation of a term to the same trustees. *Curtis v. Price*, 12 Ves. 89; *Beaumont v. Marquis of Salisbury*, 19 B. 198.

But a subsequent limitation in fee to the same trustees, and a grant of a term to other persons, will not cut down the estate of the trustees. *Colman v. Tyndall*, 2 Y. & J. 605; *Lewis v. Rees*, 3 K. & J. 132; see *Fowler v. Lightburne*, 11 Ir. Ch. 495.

Where the devise is to trustees in fee, and they must at least take an estate for life, an indefinite power of leasing will show that they were to have the fee. *Doe d. Tomkyns v. Willan*, 2 B. & Ald. 84; *Doe d. Keen v. Walbank*, 2 B. & Ad. 554; *Riley v. Garnett*, 3 De G. & S. 629; *Collier v. Walters*, 17 Eq. 252; see 1 Ch. 81. Effect of leasing powers where the devise is in fee.

This does not apply where the power to lease is limited to the continuance of the trust. *Doe d. Kimber v. Cafe*, 7 Ex. 675.

As to what is a general power of leasing, see *Vivian v. Jegon*, L. R. 3 H. L. 285.

And if the first life estate is in trust for a married woman for her separate use, as well as some of the remainders, the intermediate estates will not be legal estates; but the legal estate will be in the trustees, at any rate as long as there are Effect where there are remainders to the separate use of a married woman.

**Chap. XXIX.** any remainders to the separate use of married women left. *Harton v. Harton*, 7 T. R. 652; *Brown v. Whiteway*, 8 Ha. 145; *Toller v. Attwood*, 15 Q. B. 929.

Devise in fee with a direction to pay debts.

When there is a devise to trustees in fee, followed by a direction to pay debts, or even, when the trustees are also executors, by a mere general direction to pay debts, the fee will not be cut down to a smaller interest, such as an interest *pur autre vie*. *Spence v. Spence*, 10 W. R. 605; 12 C. B. N. S. 199; *Creaton v. Creaton*, 3 Sm. & G. 386; *Smith v. Smith*, 11 C. B. N. S. 121; *Marshall v. Gingell*, 21 Ch. D. 790.

But this is not the case with a mere charge of debts. *Kenrick v. Lord Beauclerk*, 3 B. & P. 178.

Mere general direction to pay debts.

And a general direction to pay debts will not enlarge a devise to trustees without words of limitation to a fee. *Doe v. Claridge*, 6 C. B. 641.

A devise in fee upon trust to pay an annuity for life, and after the death of the annuitant upon trust for A. in fee, gives the legal estate in fee to the trustees, if the trustees would be bound to raise arrears of the annuity by sale or mortgage. *Fenwick v. Potts*, 8 D. M. & G. 506; *Whittemore v. Whittemore*, 38 L. J. Ch. 17.

Devise to trustees without words of limitation upon trust to pay debts before the Wills Act.

4. In cases before the Wills Act a devise to trustees in words, that did not carry the fee, upon trust to pay debts, or make certain specified payments out of the rents, only gave them a chattel interest till the payments were made. *Cordall's Case*, Cro. El. 316; *Doe v. Simpson*, 5 East, 162; *Ackland v. Lutley*, 9 A. & E. 879; *Hardson v. Williamson*, 1 Kee. 33.

So where the trustees were to pay annuities, and then a specified sum out of the rents and profits, they took an estate for the lives of the annuitants with a chattel interest superadded. *Doe d. White v. Simpson*, 5 East, 162.

Sections 30 & 31 of the Wills Act.

The law, however, on this point has been altered by the 30th and 31st sections of the Wills Act, which provide:—

Section 30. "That when any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a definite

term of years, absolute or determinable, or an estate of freehold, Chap. XXIX. shall thereby be given to him expressly or by implication."

Section 31. "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

The short effect of these obscure sections as stated by Jarman, <sup>Effect of these sections according to Mr. Jarman.</sup> and adopted by most of the writers who have followed him, is, "that trustees whose estate is not expressly defined by the will, must in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee." 2 Jarm. 321; see Shelford, Real Property Stat. 532; Lewin on Trusts, 195.

## CHAPTER XXX.

## ON CERTAIN POWERS COMMONLY INSERTED IN WILLS.

**Chap. XXX.****I. Powers of sale.  
Mortgage.**

A POWER of sale and exchange authorises a partition. *In re Frith & Osborne*, 3 Ch. D. 618.

A power of sale will not as a general rule authorise a mortgage, though it may, if the object of the sale is to raise a particular charge, subject to which the estate is devised. *Stroughill v. Anstey*, 1 D. M. & G. 635.

**Severance of minerals.**

An ordinary power of sale does not authorise the severance of the timber or minerals from the land. *Cholmeley v. Paxton*, 3 Bing. 207; S. C. nom. *Cockerell v. Cholmeley*, 10 B. & C. 564; 3 Russ. 565; 1 R. & M. 418; 6 Bl. N. S. 120; 1 Cl. & F. 60; *Buckley v. Howell*, 29 B. 546.

The Confirmation of Sales Act, 25 & 26 Vict. c. 108, confirms past sales of lands without the minerals, and enables trustees to make such sales with the consent of the Court.

**Whether power of sale extends to purchased lands.**

Where there was a power to sell trust funds and invest them in the purchase of land, to be held on such trusts as would best correspond with those then subsisting, with a direction that land purchased should be considered personalty, it was held that the power of sale extended to purchased lands. *Tait v. Lathbury*, 1 Eq. 174; 35 B. 112.

**Power of sale at death of tenant for life.**

A power of sale to be exercised after the death of a tenant for life cannot be exercised during his life, though he may consent to the sale. *Blacklow v. Laws*, 2 Ha. 40; *Johnstone v. Baber*, 8 B. 233; *Mosley v. Hide*, 17 Q. B. 91; *Want v. Stallibrass*, L. R. 8 Ex. 175.

**Sale within given period.**

A direction to sell within five years has been held to be directory merely where the purchase money was to be applied

in payment of debts. *Pearce v. Gardner*, 10 H. 287; see *Cuff v. Hall*, 1 Jur. N. S. 972. Chap. XXX.

Where land is devised to several trustees in fee upon trust to sell, the survivors can sell; and it is not necessary to fill up the number of trustees in order to make a good title. *Lane v. Debenham*, 11 Ha. 192. Surviving trustee can sell.

Similarly if one trustee disclaims the others can sell. *Nicolson v. Wadsworth*, 2 Sw. 365; *Adams v. Taunton*, 5 Mad. 435; see *Crewe v. Decken*, 4 Ves. 97.

Under a devise to trustees and their heirs upon trust that they or the trustees or trustee for the time being shall sell, the heir of the surviving trustee can sell. *In re Morton & Hallett*, 15 Ch. D. 143. Heir of surviving trustee can sell.

There is an important distinction between a power coupled with an interest and a bare power. Trust and power.

Thus a devise to executors to sell passes the interest, but a devise that executors shall sell the land, or that land shall be sold by them, gives them but a power. *Howell v. Barnes*, Cro. Car. 382; *Yates v. Compton*, 2 P. W. 308; *Lancaster v. Thornton*, 2 Burr. 1027; *Doe v. Shotter*, 8 A. & E. 905; see *Knocker v. Bunbury*, 6 Bing. N. C. 306; *Lambert v. Browne*, 1 R. 5 C. L. 218.

A direction to the testator's executors to sell his lands gives the executors a common law authority under which they can vest the legal estate in a purchaser without the concurrence of the heir. Co. Lit. 112 b. Direction to executors to sell.

If the lands are devised by the will subject to the direction, it would seem the concurrence of the beneficiaries in the sale would be no more necessary, than the concurrence of the heir, if the land is not devised.

The proper form of conveyance in such a case appears to be a bargain and sale which will not require to be enrolled under 27 Hen. VIII. c. 16, as it takes effect at Common Law and not under the Statute of Uses.

If the testator directs copyholds to be sold, or to be sold and conveyed, the purchaser is entitled to be admitted without the previous admittance either of the trustees or the heir. *Holder v. Preston*, 2 Wills. 400; *R. v. Wilson*, 11 W. R. 70; 3 B. & S. 201. Direction to sell copyholds.

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The same principle applies if the copyholds are devised to the trustees subject to the power. *Glass v. Richardson*, 9 Ha. 698; 2 D. M. & G. 658.

Acting  
executors  
may sell.

The statute 21 Hen. VIII. c. 4, enacts in effect, that if any of the executors refuse to undertake the administration and charge of the will, the executors or executor accepting the charge may sell under a direction to the executors to sell the land.

Copyholds are within the statute. *Peppercorn v. Wayman*, 5 De G. & S. 230.

Survival of  
powers and  
trusts.

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) sec. 38 provides that where a power or trust is given to or vested in two or more executors or trustees, the same may be exercised or performed by the survivors or survivor. *In re Fisher & Haslett*, 13 L. R. Ir. 546; *Delany v. Delany*, 15 L. R. Ir. 55.

Sale by  
administrator.

A power of sale given to the testator's executors or administrators may be exercised by his administrator *durante minore ætate*. *Monsell v. Armstrong*, 14 Eq. 423.

Bare power  
does not  
survive.

It appears to be settled that a bare power of sale given to several persons *nominatim* cannot be exercised by the survivors. Co. Lit. 113 a, note by Hargrave.

Bare power  
connected  
with an office.

If the persons are also appointed executors, the question would be whether the power is given to them in respect of their office, or whether a personal confidence is reposed in them. See *In re Cooke's Contract*, 4 Ch. D. 454.

Power to  
named  
executors.

It is, however, settled that under a direction to "executors hereunder named" to sell land, surviving executors can sell. *Howell v. Barnes*, Cro. Car. 382; W. Jo. 352; *Brassey v. Chalmers*, 4 D. M. & G. 528.

Survivors of a  
class may sell.

It would seem, that where there is a direction that the land shall in certain events be sold by a class of persons such as the testator's sons, the power can be exercised by the surviving sons, though some have died after the testator's death. *Vincent v. Lee*, Cro. Eliz. 26.

Executor  
of executor  
cannot sell.

A power of sale given to executors, the object of the sale not being payment of debts, cannot be executed by an executor of an executor. Yearbooks, 19 Hen. VIII. fo. 9 a, pl. 4; Chance on Powers, 250.

It has been held that a bare power to sell given to trustees and their heirs can be exercised by the surviving trustees and the heir of a deceased trustee jointly, but not by survivors of the trustees only. *Mansell v. Vaughan*, Wilm. 51; *Townsend v. Wilson*, 1 B. & Ald. 608; 3 Mad. 261. See *Hall v. Dewes*, Jac. 189.

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Bare power to trustees and their heirs.

Where property was devised to trustees and their heirs on trust to sell, and the last surviving trustee died intestate, his heirs could sell. *In re Morton & Hallett*, 15 Ch. D. 143.

Devolution of trust for sale.

And it has been held that the devisee of trust estates of the last surviving trustee can also sell in such a case. *Osborne to Rowlett*, 13 Ch. D. 774.

Since the Conveyancing Act the personal representatives of the last surviving trustee are the persons to exercise the trust for sale. See section 30.

But where the devise is to trustees without words of limitation upon trust that they or the survivor shall sell, the representatives of the survivor cannot exercise the trust for sale. *In re Ingleby Boak*, 13 L. R. Ir. 326.

Where the consent of a tenant for life is required an infant tenant for life may consent if there is an intention shown that the power should be exercisable during minority; for instance, if the power is to be exercised with the consent of a named person who is an infant at the time. *In re Cardross' Settlement*, 7 Ch. D. 728.

Whether infant can consent.

If the consent of the tenant for life is required, he may give his consent, though he has aliened his life estate, if his alienee concurs. *Alexander v. Mills*, 6 Ch. 124.

Tenant for life may consent after alienation.

In the event of the bankruptcy of the tenant for life, the power of sale may be exercised with the consent of the tenant for life and his trustee in bankruptcy. *Holdsworth v. Goose*, 29 R. 111; *Eisdale v. Hammersly*, 31 B. 255; *In re Cooper*; *Cooper v. Slight*, 27 Ch. D. 565; see, too, *Hardaker v. Moorhouse*, 26 Ch. D. 417.

Bankruptcy of tenant for life.

If the tenant for life upon the alienation of his life estate has expressly reserved his right to consent to the sale, the concurrence of the alienee of the life estate is not necessary.

Reservation of power of consent.

*Warburton v. Furn*, 16 Sim. 625.

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Power of sale  
with consent.

Where trustees were authorised to sell with the consent of the tenant for life for the time being and to invest the proceeds, and there was a direction that no investment should be made while there should be a tenant for life or tenant in tail of full age without his consent, it was held that the trustees might sell during the minority of a tenant in tail without his consent. *In re Neave's Estates*, 28 W. R. 976; 49 L. J. Ch. 642.

Where the power of sale was exercisable with the consent of any tenant for life entitled to the possession of the estates, and the testator created a term upon trust to pay the rents of all his estates to his wife during her widowhood and in the event of her marriage upon trust to pay her an annuity, it was held that the trustees might sell with the consent of the tenant for life and widow. *Robertson v. Walker*, 44 L. J. Ch. 220.

Whether  
survivors of a  
class can  
consent.

Where the power was not to be exercised over any part of the property without the consent of the testator's "sons and daughters also," who were tenants for life, it was considered doubtful whether the power could be exercised after the death of a daughter. *Sykes v. Sheard*, 33 B. 114; 2 D. J. & S. 6.

Power of sale  
over reversion.

It appears to be clear, that where a reversion is settled for life with remainders, and a power of sale is given to trustees, the power of sale may be exercised before the property falls into possession. *Clark v. Seymour*, 7 Sim. 67; *Blackwood v. Borrowes*, 4 Dru. & War. 441, 468.

If the reversion is only to be sold with the consent of the person in possession under the will, the property may be sold if the person in possession surrenders his life interest to the person entitled under the will. *Truell v. Tysson*, 21 B. 437; see *Giles v. Horner*, 15 Sim. 359.

Sale at a  
future date.

A trustee for sale cannot contract to sell at a future time at a price now fixed. *Clay v. Rufford*, 5 De G. & S. 768.

Sale of several  
properties  
together.

Trustees with a power of sale may join with the owner of another property in selling both properties, if such a mode of sale is beneficial; but the purchase-money must be apportioned before the completion of the purchase. *Cavendish v. Cavendish*, 10 Ch. 319; *Morris v. Debenham*, 2 Ch. D. 540; *In re Cooper & Allen*, 4 Ch. D. 802, where *Rede v. Oakes*, 4 D. J. & S. 505, is explained.

Where the instrument expressly fixes a period within the Chap. XXX  
 bounds of perpetuity during which a power of sale may be How long a  
power of sale  
is exercisable.  
 exercised, the power is exercisable during the period though the  
 property has vested in persons absolutely entitled so long as  
 they have taken no steps to put an end to the power. *In re*  
*Cotton's Trustees*, 19 Ch. D. 624.

In the same way where property is given to absolute owners  
 free from disability, whether immediately or on the death of a  
 tenant for life, and a power of sale for the purpose of division is  
 given to trustees, this power is valid and exercisable within a  
 reasonable time after it arises. *Peters v. Lewes & East Grinstead*  
*Ry. Co.*, 18 Ch. D. 429; *In re Cooke's Contract*, 4 Ch. D. 454.

But in the ordinary case of a power of sale given to trustees When power  
of sale at an  
end.  
 without any express limit of time, so that it is necessary to find  
 some limit to save the power from invalidity on the ground of  
 perpetuity, the power is spent when the settlement is at an end,  
 that is to say, when all the interests have vested absolutely in  
 possession. *Lantsbery v. Collier*, 2 K. & J. 718; *Woolley v.*  
*Jenkins*, 23 B. 53, affirmed 3 Jur. N. S. 321; *Peters v. Lewes &*  
*East Grinstead Ry. Co.*, 18 Ch. D. 429.

For the purpose of determining, whether the interests have Limitations  
created under  
special power.  
 become absolutely vested, limitations created under a special  
 power of appointment are to be considered, as if they had been  
 inserted in the original instrument. *In re Brown's Settlement*,  
 10 Eq. 349.

The fact that a jointure secured by a term remains charged, Existence of  
jointure.  
 and that the widow has power to charge a sum of money on the  
 estate, will not keep the power of sale alive. *Woolley v. Jenkins*,  
 23 B. 53; *Wheate v. Hall*, 17 Ves. 86.

If the property is devised in moieties, the fact that the trusts Vesting of  
one moiety.  
 of one moiety have come to an end will not put an end to the  
 power of sale, if the trusts of the other moiety are subsisting,  
 unless the power is limited to property subject to continuing  
 trusts. *Trower v. Knightley*, 6 Mad. 134; *Wood v. White*, 4  
 M. & Cr. 460.

In the case of a trust for sale, it has been held that the trust Trust for sale  
not spent by  
vesting in  
possession.  
 may be exercised without the concurrence of the beneficiaries,  
 though the last tenant for life has been dead six years and all

Chap. XXX the beneficiaries are *sui juris*. *In re Tweedie and Miles' Contract*, 27 Ch. D. 315.

In this case the trust was exercised within twenty-one years after the death of the last tenant for life. But if the trust does not come to an end when the interests are vested in possession, it would seem that it may be exercised at any time unless the delay in exercising the trust has been "unreasonable"—a matter not easy to determine. In *Tweedie and Miles* six years was held not an unreasonable delay.

As to a settlement keeping alive the powers of an earlier settlement, see *In re Wright's Trustees and Marshall*, 28 Ch. D. 93.

Power to sell  
land bought  
without  
authority.

If trustees have invested trust funds in land without any authority, they can make a good title to a purchaser if one of the beneficiaries concurs, inasmuch as one beneficiary is entitled to have the estate sold. *In re Patten*, 52 L. J. Ch. 787.

Power to sell  
for satisfied  
purpose.

A power of selling for a particular purpose only, such as payment of debts, is, of course, at an end if the purpose is satisfied. *Carlyon v. Truscott*, 20 Eq. 348.

Discretionary  
trust for sale.

Where trustees have an absolute discretion as to the exercise of a power the Court will not compel them to exercise the power, though it will control an improper exercise of the power. *Marquis Camden v. Murray*, 16 Ch. D. 161; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *In re Blake*; *Jones v. Blake*, 29 Ch. D. 913; see *Thomas v. Williams*, 24 Ch. D. 558.

Whether  
trust for sale  
prevents sale  
in partition  
action.

It has been held that where there is a discretionary trust for sale subsisting the Court will not make a decree for partition or sale. *Biggs v. Peacock*, 22 Ch. D. 284.

But this principle does not apply to the case of a simple power of sale. *Re Norris*, W. N. 1883, pp. 35, 65; *Boyd v. Allen*, 24 Ch. D. 622.

Suspension of  
power of sale.

The fact that an action has been commenced to execute the trusts of the will would not prevent the trustees from exercising a power of sale if they are willing to do so, though a prudent trustee would not sell without the sanction of the Court. It may be advisable for the purchaser not to complete without notice to the plaintiffs in the action. *Cafe v. Bent*, 3 Ha. 245, 249; *Turner v. Turner*, 30 B. 414. The case of *Walker v. Smallwood*, Amb. 676, is no authority to the contrary. See, however, *Lewin on Trusts*, 374.

After judgment the powers of the trustees can only be exercised under the sanction of the Court. *Bethell v. Abraham*, 17 Eq. 24; see *In re Gadd*; *Eastwood v. Clarke*, 23 Ch. D. 134; *In re Norris*; *Allen v. Norris*, 27 Ch. D. 333. Chap. XXX.

But this rule does not apply to a sale by a tenant for life under the Settled Land Act, and probably not to a case where the action is practically at an end. *Cardigan v. Curzon Howe*, 33 W. R. 836; *In re Mansel*; *Rhodes v. Jenkin*, 54 L. J. Ch. 883.

A difficulty sometimes arises, where there is a direction to sell the testator's land, but the persons to carry out the sale are not mentioned. Persons to exercise power not named.

In such cases, if the purpose of the sale is to pay debts, the executor is the person to sell. *Anon.* 3 Dyer, 371 b; *Blatch v. Wilder*, 1 Atk. 420; *Forbes v. Peacock*, 11 M. & W. 630; see *Hooper v. Strutton*, 12 W. R. 367. Executors may sell if object of sale is to pay debts.

The same is the case, if the proceeds of sale are to be divided with the personalty in certain shares, though there may be no charge of debts. *Tylden v. Hyle*, 2 S. & St. 238; *Ward v. Devon*, cit. 11 Sim. 160; *Forbes v. Peacock*, 11 M. & W. 630; 1 Ph. 717. Proceeds of sale mixed with personalty.

But a mere direction to sell lands and divide the proceeds, where they are not mixed with the personalty, or a direction in certain events to sell lands which are directly devised, gives the executors no power of sale. *Bentham v. Wiltshire*, 4 Mad. 44; *Patton v. Randall*, 1 J. & W. 189; *Allum v. Fryer*, 3 Q. B. 442; *Curtis v. Fulbrook*, 8 Ha. 25, 278; *Haydon v. Wood*, *ib.* 279. See, however, *Lockton v. Lockton*, 1 Ch. C. 179. Direction to sell and divide.

The question, whether a charge of debts on land gives the executors a power of sale has become of small importance since Lord St. Leonards' Act, 22 & 23 Vict. c. 35, ss. 14—18, which applies to wills coming into operation after the 13th August, 1859. Power of sale implied from charge of debts.

Sections 14 and 16 in effect enact, that devisees in trust of the testator's whole interest in real estate charged with debts or legacies, no provision being made for the raising such debts or legacies, may raise the same by sale or mortgage, and where the estate subject to the charge is not devised to trustees for the testator's whole interest, the executors have a similar power of raising the amount. Lord St. Leonards' Act, secs. 14, 16, and 18.

The 16th section does not enable an administrator to sell. *In re Clay & Tetley*, 16 Ch. D. 3.

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Section 18 declares that the said sections of the Act shall not extend to a (beneficial) devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage, as he or they may by law now do.

Wills not within the Act.

In cases where this Act does not apply the law is not in a very satisfactory state.

Devise to trustees of land subject to a general charge of debts.

1. Where debts and legacies are charged on land, and the land is devised to trustees upon trusts not including the payment of debts, the trustees and not the executors are apparently the persons to sell and receive the purchase money. *Shaw v. Borrer*, 1 Kee. 559; *Ball v. Harris*, 4 M. & Cr. 264; *Stroughill v. Anstey*, 1 D. M. G. 647; *Sabin v. Heape*, 27 B. 553; *Hodkinson v. Quinn*, 1 J. & H. 303.

In such a case the fact that the trustees take only an estate *pur autre vie*, the use in remainder being executed by the effect of the Statute of Uses, will not affect their power to sell in order to raise the charge. *Eidsforth v. Armstead*, 2 K. & J. 333.

Beneficial devise subject to debts to a person who is also executor.

2. When there is a charge of debts and legacies on land, and the land is devised beneficially, expressly subject to the charge, to a person, who is one of several executors, he can sell and pass the legal estate. *Colyer v. Finch*, 5 H. L. 905; *Corsser v. Cartwright*, 8 Ch. 971; L. R. 7 H. L. 731.

Similar devise to person not executor.

3. And the case would apparently be the same where the devisee, who takes subject to the express charge, is not an executor. See *Corsser v. Cartwright*, 8 Ch. 971, 975.

Whether a general charge of debts on land gives the executor a power of sale.

4. When there is a charge of debts and legacies on land, and the land is beneficially devised or not devised at all, so that there is a difficulty how the charge is to be enforced, it would seem that *prima facie* the executor has no power to sell the land. This is the result both of the general principle of the cases and of the only authority where the exact point arose for decision. *Doe v. Hughes*, 6 Ex. 223; see *Gosling v. Carter*, 1 Coll. 644.

On the other hand an intention may be collected from the will, that the executor, and not the devisee, was intended to

enforce the charge, in which case the power of sale would include the power of passing the legal estate as well. Chap. XXX.

Thus, if the land is devised for life with contingent remainders over, it is clear that the devisees cannot make a good title; yet, on the other hand, the charge must be raised at once, and therefore a power of sale is implied in the executor. *Robinson v. Lowater*, 5 D. M. & G. 275.

Where a testator directs his debts to be paid by his executors, and charges them on his real estate, a power of sale by implication will not be given to an administrator. *In re Clay & Tetley*, 16 Ch. D. 3.

The above seems to be the effect of the actual decisions on this vexed point. Lord Romilly, however, in numerous cases has given his opinion that a charge of debts on land, where the land is beneficially devised, gives the executors an implied power of sale.

It may, perhaps, be doubted whether the cases expressed to be decided by him on this ground may not be supported upon other principles; see the cases already cited. *Wrigley v. Sykes*, 21 B. 337, might, perhaps, be upheld on the ground that an express trust to pay debts and legacies was imposed upon the executors, who were also devisees subject to a term.

At the same time it must be admitted that that case is a strong authority for the proposition that a mere charge of debts gives the executors a power of sale over realty; see, too, *Bolton v. Stannard*, 4 Jur. N. S. 576. But in all probability a court even of co-ordinate jurisdiction would find no difficulty in declining to follow *Wrigley v. Sykes* on the authority of *Doe v. Hughes*, unless it were possible to confine the decision in the latter case to the mere question of the legal estate, which, however, would be contrary to the express terms of the judgments delivered.

For the opinions of the text-writers on this subject, see Sugd. V. & P. 13th ed. 545; Pow. 121—2; Williams on Real Assets, ch. vi. p. 77; Davidson's Conv. vol. ii. 989 *n.*; Dart V. & P. 619, *seq.*; Lewin on Trusts, 402, *seq.*; Hayes & Jarman's Conc. Prec. 564; Farwell on Powers, 57; Shelford's Real Property Statutes, 484; Godefroi on Trustees, 127.

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A purchaser is not entitled to enquire whether any debts are subsisting unless twenty years have elapsed since the testator's death. *In re Tanqueray-Willlaume & Landau*, 20 Ch. D. 465; *In re Molyneux & White*, 13 L. R. Ir. 382.

**II. Power to mortgage.**

There can be no reasonable doubt, that a power to mortgage authorises a mortgage with power of sale. By sec. 19 of the Conveyancing Act, 1881, a power of sale is expressly given to mortgagees. *In re Chaumer's Will*, 8 Eq. 569, overruling *Clark v. Royal Panopticon*, 4 Dr. 26.

Under a power to raise a sum by way of mortgage, the costs of effecting the security may be raised. *Armstrong v. Armstrong*, 18 Eq. 541.

As to the validity of a mortgage by demise under a power of leasing. See *Mostyn v. Lancaster*, 23 Ch. D. 583.

**III. Power of giving receipts.**

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 36, the receipt of any trustees or trustee for any money securities or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power is made a sufficient discharge.

This power, which applies to trusts created either before or since the Act, has superseded the narrower powers given by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 23), and by Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 29).

The old law upon the question, in what cases a power of giving receipts is to be implied, is now of little importance. See Godefroi on Trustees, 125; *Elliot v. Merryman*, 1 Wh. & T. L. C. 64.

**Effect of charge of debts.**

It may be noticed here, that it was clearly settled, that a power of giving receipts is to be implied from a charge of debts, whether in fact any debts exist at the testator's death or not. *Forbes v. Peacock*, 1 Ph. 717.

**Receipt by agent.**

As a general rule, trustees ought not to authorise a solicitor or other agent, or even one of themselves to receive purchase-money, and the purchaser may insist upon payment either to the trustees personally or to their account at a bank. *In re Bellamy*, 24 Ch. D. 387; *In re Flower*, 27 Ch. D. 592.

**IV. Executor's powers.**

An executor may sell or mortgage any part of the testator's personal assets. *Earl Vane v. Rigden*, 5 Ch. 663; *Cruikshank v. Duffin*, 13 Eq. 555; *Berry v. Gibbons*, 8 Ch. 747.

The executor's power extends to real estate used for partner- Chap. XXX.  
ship purposes. *West of England and South Wales District*  
*Bank v. Murch*, 23 Ch. D. 138; see *Devitt v. Kearney*, 13 L. R.  
Ir. 45; *Boylan v. Fay*, 8 L. R. Ir. 374.

And by way of compromise, a sale partly for shares in a  
company, may be upheld. *West of England Bank v. Murch*,  
*supra*.

An administrator *durante minore etate* has the same power of  
selling personal property as an executor. *In re Cope*, 16 Ch. D.  
49; not following *In re Robinson*, 3 L. R. Ir. 429.

Debts contracted by an executor, though for the purposes of  
the estate, are the executor's debts, and cannot be proved against  
the estate. *Farhall v. Farhall*, 7 Ch. 123.

An administrator cannot by mortgage raise money for the  
repair of leaseholds, which he is not under liability to repair.  
*Ricketts v. Lewis*, 20 Ch. D. 745.

Where there is a trust for conversion, unauthorised securities V. Conver-  
sion of per-  
sonalty within  
a year.  
should, as a general rule, be sold within a year from the death.  
*Bate v. Hooper*, 5 D. M. & G. 338; *Hughes v. Empson*, 22 B.  
181.

But executors, who *bonâ fide* postpone the sale of securities Where post-  
ponement of  
conversion  
justified.  
of fluctuating value, upon which there is no liability, will not  
be liable for a loss. *Burton v. Burton*, 1 M. & Cr. 80; *Marsden*  
*v. Kent*, 5 Ch. D. 598.

Shares, upon which there is an unlimited liability, ought to  
be sold within the year under a direction to convert. *Gray-  
burn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq.  
232.

If there is a discretionary trust to convert, trustees *bonâ* Discretionary  
trust.  
*fide* exercising their discretion will not be liable for not selling  
shares upon which the liability is unlimited. *In re Norring-  
ton*; *Brindley v. Partridge*, 13 Ch. D. 655.

Under 23 & 24 Vict. c. 145, s. 30, executors had power to VI. Power to  
compromise.  
compromise debts and also claims by persons claiming as  
beneficiaries. *West of England and South Wales District*  
*Bank v. Murch*, 23 Ch. D. 138; *In re Warren*; *Weadon v.*  
*Reading*, 32 W. R. 916; 51 L. T. 561.

That section has been repealed by the Conveyancing and

**Chap. XXX.** Law of Property Act, 1881, and by section 37 large powers of compromise are conferred on trustees as well as executors.

Executors before the Act had a fair discretion as to suing debtors, but the Act has extended their powers and it seems that as long as they act in good faith they will not be liable for not taking proceedings against debtors. *Re Owens; Jones v. Owens*, 47 L. T. 61.

**VII. Investment.**

The cases upon investment will be found collected in Godefrois on Trustees, 131; Lewin, 270; Dunning Prec. 104—108.

Under the common power of investing with consent a previous consent is necessary, and it must be given at the time of the investment, and cannot be given by anticipation. *Bateman v. Davis*, 3 Mad. 98; *Child v. Child*, 20 B. 50.

If the consent is to be signified by deed, the deed may be executed after the exercise of the power, if consent has been previously given. *Offen v. Harman*, 1 D. F. & J. 253.

**VIII. Powers of leasing.**

Trustees holding lands on trust to raise money out of the rents or to pay the rents to a tenant for life, can let the lands from year to year or for any reasonable term. *Naylor v. Arnitt*, 1 R. & M. 501; *Fitzpatrick v. Waring*, 11 L. R. Ir. 35; not following *In re Shaw's Trusts*, 12 Eq. 124.

Where a tenant for life with power of leasing enters into an agreement for a lease and dies before the lease is executed the trustees may carry the agreement into effect. *Davis v. Hurford*, 22 Ch. D. 128.

As to the construction of a power of leasing, see *Hallett to Martin*, 24 Ch. D. 624.

**Lease by executor.**

An executor can make a lease, but if impugned by a beneficiary it would lie upon the executor and lessee to show that it was made in a due course of administration. *Keating v. Keating*, Ll. & G. t. Sug. 133.

**Lease with option to purchase.**

If an executor makes a lease giving the lessee an option to purchase at a fixed price, the option to purchase cannot be exercised against the beneficiaries. *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236.

**Lease of several properties.**

In the absence of any special circumstances trustees of contiguous estates held upon different trusts cannot make a

lease of both estates under one demise. *Tolson v. Sheard*, Chap. XXX.  
5 Ch. D. 10.

A power to lease after the death of a tenant for life cannot be exercised before his death, though the life estate may be surrendered. *Coxe v. Day*, 13 East, 118. Power to lease not accelerated.

Large powers of management, and of laying out money in repairs and improvements, are given by the Conveyancing Act, 1881, section 42, and the Settled Land Act, 1882, section 21. IX. Management, repairs, and improvements.

Formerly, money to be laid out in land could be laid out in the erection of new buildings, but not in repairs and permanent improvements. *Drake v. Trefusis*, 10 Ch. 364.

But now by virtue of the Settled Land Act, 1882, section 21 capital money arising under the Act can on the direction of the tenant for life be laid out in any of the modes mentioned in the section which include improvements, and inasmuch as land if purchased could be sold by the tenant for life and applied under the Act, money to be invested in land can be applied as capital money arising under the Act. *In re Mackenzie's Trusts*, 23 Ch. D. 750.

The Conveyancing Act, section 42, confers powers of management upon trustees where infants are beneficially interested in the land and expenses may be paid out of income.

Where an infant is absolutely entitled the Court will, if necessary, raise money required for repairs by mortgage of the estate. *In re Jackson*; *Jackson v. Talbot*, 21 Ch. D. 786; *In re Household*; *Household v. Household*, 27 Ch. D. 553.

Executors or trustees cannot carry on the testator's business without express authority to do so. *Travis v. Milne*, 9 Ha. 142; *Kirkman v. Booth*, 11 B. 273. X. Carrying on business.

Where a will contained the usual trust for sale with power to postpone the sale, the executors were held justified in carrying on the business for two years with a view to a sale. *In re Chancellor*; *Chancellor v. Brown*, 26 Ch. D. 42.

A direction to carry on the testator's business only authorises the employment in the business of the capital, which the testator himself employed in the business at his decease. *M'Neillie v. Acton*, 4 D. M. & G. 744; see *Re Dimmock*; *Dimmock v. Dimmock*, 52 L. T. 494. What capital may be employed.

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So long as the business is properly carried on the trustees are entitled to occupy, rent free, freehold premises belonging to the testator and used by him for the purposes of the business. *In re Cameron; Nixon v. Cameron*, 26 Ch. D. 19; see *Devitt v. Kearney*, 13 L. R. Ir. 45.

An authority to trustees to carry on the business does not authorise two out of three trustees to carry it on. *Ex parte Butcher; In re Mellor*, 13 Ch. D. 465.

Effect of  
direction to  
carry on  
business.

If the executor has power to carry on the testator's business, the debts incurred are primarily the debts of the executor, but the executor is entitled to be indemnified out of the estate to the extent of the assets authorised by the will to be employed in trade.

If the executor in carrying on the business contracts debts, the creditors cannot take the testator's assets in execution *In re Morgan; Pillgrem v. Pillgrem*, 18 Ch. D. 93; *Lord Talbot de Malahide v. Moran*, 8 L. R. Ir. 307; see *Strickland v. Symons*, 26 Ch. D. 245.

If the executor is insolvent the creditors are entitled to stand in his place against the assets of the testator. *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, Buck, 202; 3 Mad. 138; *Scott v. Izon*, 34 B. 434; *M'Neillie v. Acton*, 4 D. M. & G. 744; *Owen v. Delamere*, 15 Eq. 134; *Hall v. Fennell*, 1 R. 9 Eq. 406, 615; *Fairland v. Percy*, 3 P. & D. 217.

But as the creditors' right against the testator's assets depends on the authority conferred by the will, they must be taken to have notice of a clause in the will putting an end to the power to carry on the business. *Gallagher v. Ferris*, 7 L. R. Ir. 489.

The creditors are only entitled to stand in the place of the executor, and are subject to all equities subsisting between him and the estate. *In re Johnson; Shearman v. Robinson*, 15 Ch. D. 548; *Strickland v. Symons*, 22 Ch. D. 666; 26 *ib.* 245.

Right of  
creditors  
where  
business  
carried on  
without  
authority.

If the business is carried on without authority by the executor of a deceased partner, the assets which remain in specie are applicable towards payment of the creditors of the old firm, and the doctrine of order and disposition does not apply. *Ex parte Butcher; In re Mellor*, 13 Ch. D. 465.

If a tenant for life is allowed to carry on the testator's business without authority, but the financial part of the business is carried on through an account in the name of the executors, creditors of the tenant for life are entitled to his life interest only in the stock of the testator remaining in specie, or in stock replacing the original stock. *Ex parte Barber*; *In re Onslow*, 28 W. R. 522.

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Tenant for life carrying on business.

On the other hand, if an executor, who is also residuary legatee, carries on the business without authority the assets belong to the creditors of the executor. *In re Fells*; *Ex parte Andrews*, 4 Ch. D. 509.

By section 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) "where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit the income of that property or any part thereof whether there is any other fund applicable to the same purposes or any person bound by law to provide for the infant's maintenance or education or not."

XI. Power of maintenance.

The residue of the income is to be accumulated and go to the person ultimately entitled to the property, but the trustees may apply accumulations as if they were income of the current year.

The section applies to all instruments if there is no contrary intention expressed.

An express trust to accumulate the income of infant's shares is not a contrary intention. *In re Thatcher's Trusts*, 26 Ch. D. 426.

This power appears to be practically the same as that contained in Lord Cranworth's Act (23 & 24 Vict. c. 145) section 26. It enables income to be applied for maintenance in cases where the gift of capital and income is contingent, but not where the legacy does not carry interest. *In re Cotton*, 1 Ch. D. 232; *In re George*, 5 Ch. D. 837; *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Dickson*; *Hill v. Grant*, 28 Ch. D. 291; affd. 29 Ch. D. 331; see *ante*, p. 130.

- Chap. XXX.** The power of maintenance does not extend beyond the age of twenty-one. *In re Breed's Will*, 1 Ch. D. 226.
- Education.** Under a power to apply money towards the maintenance or support of infants, sums may be expended on education. *In re Breed's Will*, 1 Ch. D. 227.
- Discretionary powers.** Discretionary powers of maintenance may be variously expressed.
- Discretion as to amount.** *a.* The trustees may be bound to apply the income in maintenance, but they may have a discretion as to the amount, or as to the time and mode of application. In such cases the Court will control the exercise of the discretion, and will require the income to be applied in the way in which it would have been applied by the Court. *In re Hodges*; *Davey v. Ward*, 7 Ch. D. 754; *In re Roper's Trusts*, 11 Ch. D. 272.
- Thus the trustees will be bound to apply the income of a life interest, over which their discretion extends, in exoneration of property to which the infant is absolutely entitled. *In re Weaver*, 21 Ch. D. 615.
- And the trustees ought not to pay the income to a father who is not unable to maintain the children, and if they do so the father must account for what he has received. *Thompson v. Griffin*, Cr. & Ph. 317; *Wilson v. Turner*, 22 Ch. D. 521; overruling *Ransome v. Burgess*, 3 Eq. 773.
- Absolute discretion.** *b.* Or again the maintenance clause may be so framed as to give the trustees an absolute discretion as to whether they shall apply anything at all for maintenance, or there may be a direction that the trustees are not to be controlled.
- In such cases the Court will not interfere with the discretion of the trustees. *Gisborne v. Gisborne*, 2 App. C. 300; *Tabor v. Brooks*, 10 Ch. D. 273; see *In re Lofthouse*, 29 Ch. D. 921.
- The trustees may exercise their discretion after the fund has been paid into Court in a suit. *Brophy v. Bellamy*, 8 Ch. 798.
- But if the trustees pay the fund into Court under the Trustee Relief Act their discretion is at an end. *In re Williams' Settlement*, 4 K. & J. 87; *In re Mulqueen's Trusts*, 7 L. R. Ir. 127.
- Trust for maintenance.** *c.* If there is a trust to apply the income for maintenance, the income must be so applied, and if the father has himself maintained his children he is entitled to be recouped out of the

income of the fund. *Stocken v. Stocken*, 4 Sim. 152; 4 M. & Cr. 95; *Meacher v. Young*, 2 M. & K. 490. Chap. XXX.

This rule would probably not now be applied when the trust is to apply the whole or part of the income at the discretion of the trustees. *In re Kerrison's Trusts*, 12 Eq. 422; see *Wilson v. Turner*, 22 Ch. D. 521; where *Mundy v. Earl Howe*, 4 Bro. C. C. 224 is considered.

The distinction which has been made on this subject between voluntary gifts and marriage settlements cannot now be upheld. See *Wilson v. Turner*, *supra*.

For the principles upon which maintenance may be allowed to infants by the Court contrary to the terms of the will, see *Havelock v. Havelock*; *In re Allan*, 17 Ch. D. 807; *In re Colgan*, 19 Ch. D. 305; *Kemmis v. Kemmis*, 13 L. R. Ir. 372; 15 *ib.* 90; *Re Tanner*, 51 L. T. 507.

A trustee who has, without authority, expended sums for the maintenance of an infant, will be allowed all such sums as the Court would have authorised if it had been applied to. *Brown v. Smith*, 10 Ch. D. 377. Sums expended without authority.

When a guardian pays an infant's income to his co-guardian by whom the infant is properly maintained, the guardian will be allowed such a sum as was proper to be allowed for the maintenance of the infant without vouching the details. *In re Evans*; *Welch v. Chennell*, 26 Ch. D. 58.

The Court has jurisdiction on a summary application to direct past maintenance to be charged on an infant's freehold estate. *In re Howarth*, 8 Ch. 415.

It seems that accumulations of income may be applied in maintenance in subsequent years without express authority. *Edwards v. Grove*, 2 D. F. & J. 210.

Powers of advancement are not, in the absence of express words, to be confined to minority. *Clarke v. Hogg*, 19 W. R. 617. XII. Power of advancement.

A power of advancement, exerciseable with the consent of the tenant for life, may be exercised after the bankruptcy of the tenant for life with his consent and that of his trustee in bankruptcy. *In re Cooper*; *Cooper v. Slight*, 27 Ch. D. 565.

A power of advancement would not justify the payment of a

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sum to a beneficiary merely to put into his own pocket. But it would justify the payment of a sum for the purpose of making a settlement on the family of the beneficiary if he has no property producing income. *Roper Curzon v. Roper Curzon*, 11 Eq. 452.

## Payment to husband.

Such a power would not justify a payment to the husband of a beneficiary without some security for the repayment of the amount. *Talbot v. Marshfield*, 3 Ch. 622; *In re Kershaw's Trusts*, 6 Eq. 322.

## Payment of debts.

A power to apply a sum for the preferment, advancement, or otherwise for the benefit of a legatee authorises the payment of his debts. *Lowther v. Bentinck*, 19 Eq. 166; see *In re Brittlebank*; *Coates v. Brittlebank*, 30 W. R. 99.

## XIII. Indemnity.

An indemnity clause providing that any trustee enabling his co-trustee to receive any moneys should not be liable to see to the application thereof has been held to protect a trustee against misappropriation of the trust fund by his co-trustee. *Wilkins v. Hogg*, 3 Giff. 116; 10 W. R. 47; *Pass v. Dundas*, 29 W. R. 332.

## XIV. Costs.

A direction that a solicitor trustee is to be allowed to charge for professional services will be limited strictly to professional services, unless there are words extending the direction to non-professional charges. *Harbin v. Darby*, 28 B. 325; *In re Ames*; *Ames v. Taylor*, 25 Ch. D. 72; *In re Chapple*; *Newton v. Chapman*, 27 Ch. D. 584.

## XV. Power to decide questions.

A power to trustees to decide questions does not oust the jurisdiction of the Court. *Massy v. Rogers*, 11 L. R. Ir. 409.

## CHAPTER XXXI.

## ABSOLUTE INTERESTS IN PERSONALTY.

## I. BEQUESTS OF PERSONALTY WITH WORDS OF LIMITATION.

1. IT is clear that a bequest to A. and his executors, or to A. Chap. XXXI.  
and his representatives, gives A. the absolute interest, the Bequest to A.  
and his  
executors or  
representa-  
tives.  
additional words being merely words of limitation. *Lugar v. Harman*, 1 Cox, 250; *Taylor v. Beverley*, 1 Coll. 108; *Appleton v. Rowley*, 8 Eq. 139.

So, too, a gift to A. for life, and then to his executors or Bequest to A.  
for life and  
then to his  
executors.  
administrators, or to his personal representatives, gives A. the absolute interest. *A.-G. v. Malkin*, 2 Ph. 64; *Saberton v. Skeels*, 1 R. & My. 587; *Alger v. Parrot*, L. R. 3 Eq. 328; *Avern v. Lloyd*, 5 Eq. 383; *Wing v. Wing*, 24 W. R. 878.

It is of course immaterial, that the life interest is determinable. *Webb v. Sadler*, 14 Eq. 533; 8 Ch. 419.

If, however, the gift is to A. for life, and then to his executors or administrators for their own use and benefit, they will take beneficially. *Sanders v. Franks*, 2 Mad. 147; *Wallis v. Taylor*, 8 Sim. 241. In what case  
the executors  
take bene-  
ficially.

But the intention that the executors are to take beneficially must be unmistakeably plain. *Stocks v. Dodsley*, 1 Keen, 325.

A gift to A. for life with power to appoint by will and in default of appointment to his executors and administrators, gives an absolute interest and entitles the donee to immediate payment, and it is apparently not necessary that the power should be released. *Devall v. Dickens*, 9 Jur. 550; *Page v. Soper*, 11 Ha. 321.

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**Gift at the death of A.** 2. A gift to A., and at his death to his children, would it seems give a life interest only to A. *In re Russell*, 53 L. J. Ch. 400; revd. W. N. 1885, 21; *In re Houghton*; *Houghton v. Brown*, 53 L. J. Ch. 1019; see *In re Percy*; *Percy v. Percy*, 24 Ch. D. 616.

**Bequest to A. and his heirs.** 3. A bequest of personalty to a man and his heirs would no doubt pass the absolute interest.

**Bequest to A. and the heirs of his body.** So, too, a bequest to A. and the heirs of his body, or to A. and the heirs of his body, in equal proportions, gives A. an absolute interest in personalty. *Leventhorpe v. Ashbie*, Rolle's Ab. 831, pl. 1; *Seale v. Seale*, 1 P. W. 290; *In re Barker's Trusts*, 52 L. J. Ch. 565.

**Bequest to A. for life and if he dies without issue over before the Wills Act.** It seems that in wills before the Wills Act, if the gift is to A. for life, and if he die without issue over, an absolute interest will not be given to A. by implication, though if the property had been real estate, A. would have taken an estate tail. *Procter v. Upton*, cit. 5 D. M. & G. 199 n.; *In re Banks' Trust*; *Ex parte Hovill*, 2 K. & J. 387; see *A.-G. v. Bayley*, 2 B. C. C. 553; *Chandless v. Price*, 3 Ves. 98; *Bodens v. Lord Galway*, 2 Ed. 297.

**Bequest to A. for life and then to the heirs of his body followed by a gift over.** On the other hand, a gift to A. for life and then to the heirs of his body, and if he die without issue over, gives A. an absolute interest. *Butterfield v. Butterfield*, 1 Ves. sen. 133; *Theebridge v. Kilburne*, 2 Ves. sen. 233; *Williams v. Lewis*, 3 Dr. 669; 6 H. L. 1013; see, too, *Elton v. Eason*, 19 Ves. 73; *Garth v. Baldwin*, 2 Ves. sen. 646; *Tothill v. Pitt*, 1 Mad. 488; 7 B. P. C. 453; *Brouncker v. Bagot*, 19 Ves. 574; 1 Mer. 271.

Of course if, in wills before the Wills Act, the gift over upon failure of issue can be limited to failure of issue at the death of the tenant for life, a prior gift to A. and the heirs of his body gives A. an interest defeasible upon failure of issue at his death. *Read v. Snell*, 2 Atk. 642; *Hodgeson v. Bussey*, 2 Atk. 89; *Paine v. Stratton*, 2 Atk. 647; 3 B. P. C. 257; *Fearne*, C. R. 494.

In these cases the testator has shown a clear meaning, that the property should go in a course of devolution, till there is an exhaustion of heirs of the body; and, as this intention cannot be carried into effect, the Court gives an absolute interest in personalty. See *Ex parte Wynch*, 5 D. M. & G. 188.

But if such an intention is not manifested, it seems that the Courts will be unwilling to apply the rules of tenure to personal estate, and it must be collected from the general language of the will, whether the words heirs and heirs of the body are intended to be words of limitation or purchase.

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In what cases heirs of the body will be a word of limitation in bequests since the Wills Act.

Thus, if the bequest is to A. for life, and after her decease to her heirs as she shall give it by will, and if she die without a will to her right heirs for ever, the term right heirs is equivalent to executors and administrators. *Powell v. Boggis*, 35 B. 535.

So if the intention is to create a succession of estates, as in a gift to A. for life and after his decease to the heirs male of his body, and so in succession, A. takes an absolute interest. *Britton v. Twining*, 3 Mer. 176; see *Cleary's Trust*, 16 Ir. Ch. 438; *Sparling v. Parker*, 29 B. 450.

But if there is anything to show that the heirs were to take by purchase; if, for instance, they are to take as tenants in common, the life estate will not be enlarged, whether there is a gift over in default of issue or not. *Bull v. Comberbach*, 25 B. 540; *Jacobs v. Amyott*, 4 B. C. C. 542; *Jeaffreson's Trust*, L. R. 2 Eq. 276; see, too, *In re Russell*, 53 L. J. Ch. 400; revd. W. N. 1885, 21; 52 L. T. 559.

Words of distribution super-added make the word heirs a word of purchase.

So, too, in a gift to A. for life with a direction that he was to have no power over the property beyond its legal vestment for conveyance, &c., and after his decease to his heirs, A. took only a life interest in the personalty, though he took the realty in fee. *Herrick v. Franklin*, 6 Eq. 593; see *Comfort v. Brown*, 10 Ch. D. 146.

The better opinion seems now to be, that the Court will not shrink from giving a different construction to the words heirs and heirs of the body as regards realty and personalty, though given together in the same clause. *Herrick v. Franklin*, *supra*.

Whether the same construction will be adopted as regards realty and personalty where they are given together.

4. The word issue is less "mysteriously inflexible" than the words heirs of the body, and therefore in a gift of personalty to A. and his issue it may be a word of limitation or of purchase, in which latter case the same question arises as in gifts to A. and his children, whether A. and the issue take jointly or whether the issue take subject to a life interest in A.

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Bequests to  
a person and  
his issue.

a. *Prima facie* it seems a gift of personalty to A. and his issue, as it would give A. an estate tail in realty, gives him an absolute interest in personalty. This seems clear, when there is a gift over in default of issue, for the limitation over shows, that the gift is meant to extend to all the issue, and all the issue might not be capable of taking jointly with the parent. *Lyon v. Michell*, 1 Mad. 467; *Beaver v. Nowell*, 25 B. 551; *Re Andrews' Will*, 27 B. 608; *Donn v. Penny*, 1 Mer. 20; 19 Ves. 544; *Gibbs v. Tait*, 8 Sim. 132.

And apparently the same rule will hold good even where there is no gift over. *Harvey v. Towell*, 7 Ha. 231; *Samuel v. Samuel*, 9 Jur. 222; *Prentice v. Brooke*, 5 L. R. Ir. 435; but *quære*.

The case is stronger in favour of this construction, if it is a gift of realty and personalty together, or if personalty is directed to go in the same way as realty. *Parkin v. Knight*, 15 Sim. 83; *Tate v. Clarke*, 1 B. 100.

In what cases  
issue will be  
a word of  
purchase.

b. If, however, there is any evidence, that the testator did not use the word as a word of limitation, by the use of expressions implying, either that the parent and issue take concurrently: *Clay v. Pennington*, 7 Sim. 370; *Law v. Thorp*, 27 L. J. Ch. 649; or that the issue take after the parent's death as purchasers: *Lampley v. Blower*, 3 Atk. 396; *Parsons v. Coke*, 4 Dr. 296; or that they are to take by substitution, by directing, for instance, that the issue are to take *per stirpes*: *Butter v. Ommaney*, 4 Russ. 70; *Pearson v. Stephen*, 5 Bl. N. S. 203; *Dick v. Lacy*, 8 B. 214; *Re Stanhope's Trusts*, 27 B. 201, the issue will take by purchase.

Bequests to  
A. for life and  
then to his  
issue.

c. If the gift of personalty is to A. for life and then to his issue, whether there is a gift over in default of issue or not, A. takes only an estate for life. *Knight v. Ellis*, 2 Bro. C. C. 569; *Ex parte Wynch*, 5 D. M. & G. 188; *Goldney v. Crabb*, 19 B. 338; *Foster v. Wybrants*, I. R. 11 Eq. 40.

And the same rule applies with regard to the personalty, where real and personal property are given together, unless there is something to show that the personalty was to go in the same manner as the realty.

"Except in a case where the personalty is either quite

subordinate in value or a mere adjunct of the realty, as, for Chap. XXXI. example, a leasehold garden held together with a freehold house, it is very difficult to give any sound logical reason for the proposition, that an intention that the two kinds of property should go together ought to carry the whole in accordance with the rules applicable to realty rather than with those which would apply to a bequest of personalty alone." *Per* Lord Hatherley, *Jackson v. Calvert*, 1 J. & H. 235.

But, though only a life estate may be given to the ancestor, if the issue are to take successively according to seniority, and not conjointly, issue will be treated as a word of limitation. *Jordan v. Lowe*, 6 B. 350.

## II. GIFTS OF THE INCOME OF PROPERTY INDEFINITELY.

A gift of the income of property to a person, without limitation as to time, is a gift of the capital, where no other disposition of the capital is made.

This is the case, though the gift may be to the separate use, or through the medium of a trust. *Elton v. Shepherd*, 1 B. C. C. 532; *Phillips v. Chamberlayne*, 4 Ves. 51; *Rawlings v. Jennings*, 13 Ves. 39; *Boosey v. Gardner*, 18 B. 471; *Haig v. Swiney*, 1 S. & St. 487; *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Watkins v. Weston*, 32 B. 238; 3 D. J. & S. 434; *Penny v. Pippin*, 15 W. R. 306.

A gift of income during widowhood is a gift for life or during widowhood; but a gift of income to a legatee so long as she should continue single and unmarried has been held to be an absolute interest if the legatee did not marry. *Rishton v. Cobb*, 5 M. & Cr. 145; see 25 Ch. D. 689.

In the same way a gift of the income of property, with a power superadded of disposing of it by will, is an absolute interest. *Southouse v. Bate*, 16 B. 132; *Weale v. Olive*, 32 B. 421.

The fact, that legacies are given at the decease of the person, to whom the income is given indefinitely, will only cut down the absolute interest to the extent of the legacies. *Jennings v. Baily*, 17 B. 118.

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Upon similar principles a gift of income to A. for life, and then to B. indefinitely, gives B. the absolute interest. *Clough v. Wynne*, 2 Mad. 188.

Contrary  
intention.

But a gift of income to B. and C. and the survivor of them gives them only life interests. *Blunn v. Bell*, 2 D. M. & G. 775.

## III. PROPERTY AND POWER.

Gift to be at  
the disposal of  
a person.

1. A gift to be at the disposal of A. is an absolute gift. *Nowlan v. Walsh*, 4 De G. & S. 584; *Re Maxwell's Will*, 24 B. 246; *Hoy v. Master*, 6 Sim. 568; *Kellett v. Kellett*, L. R. 3 H. L. 160.

The same construction has been adopted where property has been directed to be at the disposal of A. by will, or after his death. *Robinson v. Dugate*, 2 Ver. 180; *Hixon v. Oliver*, 13 Ves. 108.

Effect of a  
power super-  
added to an  
absolute gift.

2. If there is a gift to A. in general terms, a superadded power to dispose of the property in question by will, or at the donee's death, does not cut down the absolute gift. *Southouse v. Bate*, 16 B. 132; *Weale v. Ollive*, 32 B. 421; *Comber v. Graham*, 1 R. & M. 450; *Re Mortlock's Trust*, 3 K. & J. 456. See *Hales v. Margerum*, 3 Ves. 299; and *Bull v. Kingston*, 1 Mer. 314.

So a devise of lands in fee to the intent that the devisee may enjoy the same for life and by will dispose of the same, gives the devisee the fee. *Doe d. Herbert v. Thomas*, 3 A. & E. 123.

And even a superadded power to dispose of the property among a particular class will not cut down the absolute interest previously given. *Howarth v. Dewell*, 29 B. 18; *Brook v. Brook*, 3 Sm. & G. 280; *Reeves v. Baker*, 18 B. 372.

Of course a mere power to dispose of property among a certain class gives no property to the donee of the power. *Birch v. Wade*, 3 V. & B. 198; *Blakeney v. Blakeney*, 6 Sim. 52. See *Acheson v. Fair*, 3 Dr. & War. 512.

Effect of a  
power super-  
added to a  
life interest.

3. But if the gift is to A. for life, with a superadded power to dispose of the whole for his own benefit, A. takes only a life interest if he does not exercise the power. *Archibald v. Wright*, 9 Sim. 161; *Bradley v. Westcott*, 13 Ves. 445; *Reith v. Seymour*,

4 Russ. 263; *Scott v. Josselyn*, 26 B. 174; *Pennock v. Pennock*, Chap. XXXI. 13 Eq. 144; *In re Stringer's Estate*; *Shaw v. Ford*, 6 Ch. D. 1; *In re Thomson's Estate*; *Herring v. Barrow*, 14 Ch. D. 263.

In such a case the presentation of a petition for payment out of Court amounts to an appointment, and entitles the legatee absolutely. *Holloway v. Clarkson*, 2 Ha. 521; *Cambridge v. Rouse*, 25 B. 574; *David's Trusts*, Johns. 495.

And when the tenant for life has power to go to the principal, only if the income is insufficient, she is entitled only to so much of the capital as will afford a suitable maintenance. *Re Pedrotti's Will*, 27 B. 583.

#### IV. EFFECT OF SUBSEQUENT RESTRICTIONS UPON ABSOLUTE INTERESTS.

In some cases there is an absolute gift in the first instance, out of which particular interests are subsequently carved. In such cases the rule is:—

“If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. But if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose; in the former the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee.” *Per Lord Cottenham, Lassence v. Tierney*, 1 Mac. & G. 551.

*Absolute interests cut down for a particular purpose remain so far as those purposes do not take effect.*

Thus, if there is an absolute gift by a will, and restrictions are imposed upon the legatee's enjoyment by a codicil, the absolute gift remains so far as the restrictions do not extend. *Norman*

Chap. XXXI v. *Kynaston*, 3 D. F. & J. 29; *Watkins v. Weston*, 3 D. J. & S. 434.

So when there is a valid appointment to objects of a power, with limitations or restrictions which are beyond the power, the invalid restrictions may be rejected. *Stephen v. Gadsden*, 20 B. 463; *Gerrard v. Butler*, *ib.* 541; *Churchill v. Churchill*, 5 Eq. 44; *Webb v. Sadler*, 14 Eq. 533; 8 Ch. 419.

But where there is no absolute gift, the legatees can take no more than is given them. *Savage v. Tyers*, 7 Ch. 356.

What is an absolute gift in the first instance.

The difficulty in these cases lies in ascertaining, whether there is an absolute gift in the first instance or not. The question is whether the original gift is qualified by the words in which it is given: *Scawin v. Watson*, 10 B. 200; *Gompertz v. Gompertz*, 2 Ph. 107; *Lassence v. Tierney*, 1 Mac. & G. 551; *Harris v. Newton*, 25 W. R. 228; 46 L. J. Ch. 268; *Re Richards*; *Williams v. Gorvin*, 50 L. T. 22; or whether there is an independent gift, with a direction as to the mode of its enjoyment. *Campbell v. Brownrigg*, 1 Ph. 301; *Whittell v. Dudin*, 2 J. & W. 279; *Winckworth v. Winckworth*, 8 B. 576; *Mayer v. Townshend*, 3 B. 443; *McTear v. McDowell*, 11 Ir. Ch. 338; *Welpley v. Cormick*, 16 Ir. Ch. 74; *Kellett v. Kellett*, L. R. 3 H. L. 160.

Power and trust

When an absolute interest is cut down to a life estate, with a power of appointment among children, this does not mean that the absolute interest is to be cut down, only if the donee appoints, but if there are children the donee is bound to appoint to them. *Butler v. Gray*, 5 Ch. 26.

Upon the question to whom a fund results where the trusts of the settlement fail, see *In re Nash's Trusts*, 30 W. R. 406.

## V. GIFTS BENEFICIAL OR IN TRUST.

On the question whether a gift is beneficial or in trust, the cases are numerous. The inclination of the Courts is not to construe doubtful words into a declaration of trust, and many of the earlier cases in which a trust has been held to be created would probably now be differently decided.

A. A gift to a person for some particular purpose, whether declared or not, creates a trust. *Chap. XXXI.*  
*Corporation of Gloucester v. Wood*, 3 Ha. 131; 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419; see *Barrs v. Fewkes*, 2 H. & M. 60; 12 W. R. 666; 13 W. R. 987.

So, too, the words "to the intent" create a trust. *Raikes v. Ward*, 1 Ha. 445.

And where an executrix had received a legacy for her trouble, a bequest of the residue to her, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes," was held to be in trust. *Briggs v. Penny*, 3 De G. & Sm. 525; 3 Mac. & G. 546; *Bernard v. Minshull*, Johns. 276; see *Stead v. Mellor*, 5 Ch. D. 225.

B. The cases are more difficult, where the intention is to give the donee a beneficial interest, but there is a recommendation to apply the property for the benefit of certain objects. In such cases the Court will imply a trust if the property to be subject to, and the objects to be benefited by, the implied trust are sufficiently certain.

1. It must be clear that the testator intends the property he has bequeathed, or some part of it, to be applied by the donee for the purposes of the trust.

It must be clear what property is to be subject to the trust.

a. Therefore mere expressions of a desire that the donee will be kind to: *Buggins v. Yates*, 9 Mod. 122; 8 Vin. Ab. 72, pl. 27; remember: *Bardswell v. Bardswell*, 9 Sim. 319; consider: *Salé v. Moore*, 1 Sim. 534; deal justly by: *Pope v. Pope*, 10 Sim. 1; educate and provide for: *Macnab v. Whitbread*, 17 B. 299; *Winch v. Brutton*, 14 Sim. 379; *Fox v. Fox*, 27 B. 301; or do justice to: *Ellis v. Ellis*, 23 W. R. 382, a certain class of persons will raise no trust.

b. Though some property may be mentioned out of which the trust is to be performed, this is not enough, if it is not clear what the property is; as if the donee is requested to give "whatever she can transfer:" *Flint v. Hughes*, 6 B. 342; or the bulk: *Palmer v. Simmonds*, 2 Dr. 221; or "when no longer required by her:" *Mussoorie Bank v. Raynor*, 7 App. C. 321; or if the precatory words apply not only to the

Chap. XXXI. property given by the testator, but to all the property of the legatee: *Eade v. Eade*, 5 Mad. 118; *Lechmere v. Lavie*, 2 M. & K. 197; *Parnall v. Parnall*, 9 Ch. D. 96. See *Knight v. Boughton*, 3 B. 148; 11 Cl. & F. 513.

c. As there can be no gift over of what a legatee does not dispose of, so no trust will be fixed upon it. *Bland v. Bland*, 2 Cox. 349; *Wilson v. Major*, 11 Ves. 205; *Pushman v. Filliter*, 3 Ves. 7; *Cowman v. Harrison*, 10 Ha. 234; *Green v. Marsden*, 1 Dr. 646.

The objects of the trust must be reasonably certain.

2. If the donee has a wide discretion as to the objects to be benefited, so that it is uncertain whom the testator meant, the Court will infer that precatory words were not intended to create an imperative trust. *Bernard v. Minshull*, Jo. 276, 287.

a. Thus, where there is absolute power of disposal, with a confidence expressed, that the donee will dispose of the property according to the testator's wishes, where none are expressed, there is no trust. *Reid v. Atkinson*, I. R. 5 Eq. 162, 373; *Creagh v. Murphy*, I. R. 7 Eq. 182.

b. Though words are used, such as "family," "relations," or "heirs," to which the Court would give a meaning in a direct gift, no trust will be implied if it is uncertain what the testator meant by them. *Harland v. Trigg*, 1 B. C. C. 141; *Wright v. Atkyns*, 17 Ves. 255; 1 V. & B. 313; 19 Ves. 299; T. & R. 162; Sug. Prop. 388; *Williams v. Williams*, 1 Sim. N. S. 358; *Green v. Marsden*, 1 Dr. 646; *Meredith v. Heneage*, 1 Sim. 542; *Greene v. Greene*, I. R. 3 Eq. 90, 629.

Precatory words may be explained so as not to raise a trust.

3. No trust will be implied from precatory words:

a. Where the donee may at his discretion apply the property to other purposes. *Lefroy v. Flood*, 4 Ir. Ch. 1; *Curtis v. Rippon*, 5 Mad. 434; *House v. House*, 23 W. R. 22; *Ex parte Payne*, 2 Y. & C. Ex. 636.

b. Or where there is an express direction that the donee's absolute interest is not to be curtailed. *Huskinson v. Bridge*, 15 Jur. 738; *Eaton v. Watts*, 1 Eq. 151.

c. Where the precatory words are stated not to be obligatory. *Young v. Martin*, 2 Y. & C. C. 582; *Shepherd v. Nottidge*, 2 J. & H. 766; *In re Bond*; *Cole v. Hawes*, 4 Ch. D. 238.

d. Or where the donee is to take free and unfettered. Chap. XXXI.  
*Meredith v. Heneage*, 1 Sim. 542; 10 Pr. 306; *Hoy v. Master*  
 6 Sim. 568; *White v. Briggs*, 15 Sim. 33.

4. Where, however, there is sufficient certainty on the points already mentioned, a trust may be implied from any of the following expressions:

What words  
are sufficient  
to raise a  
precatory  
trust.

a. Words of confidence, such as "trusting:" *Baker v. Moseley*, 12 Jur. 740; *Irvine v. Sullivan*, 8 Eq. 673; "confiding:" *Griffiths v. Evan*, 5 B. 241; "not doubting:" *Parsons v. Baker*, 18 Ves. 476; "firm conviction:" *Barnes v. Grant*, 26 L. J. Ch. 92.

b. Words of request and entreaty, such as "entreat:" *Prevost v. Clarke*, 2 Mad. 458; "require and entreat:" *Taylor v. George*, 2 V. & B. 378; "wish and request:" *Foley v. Parry*, 5 Sim. 138; 2 M. & K. 138; "dying request:" *Pierson v. Garnet*, 2 B. C. C. 37, 226; "request:" *Eude v. Eade*, 5 Mad. 118; "beg:" *Corbet v. Corbet*, 1 R. 7 Eq. 456; "dying wish:" *Godfrey v. Godfrey*, 11 W. R. 554; "last will:" *Hinxman v. Poynder*, 5 Sim. 546; "wish and desire:" *Liddard v. Liddard*, 28 B. 266; see *Teasdale v. Braithwaite*, 5 Ch. D. 630; "desire:" *Harding v. Glyn*, 1 Atk. 469.

c. Even words of advice and recommendation, such as "advise:" *Parker v. Bolton*, 5 L. J. Ch. 98; "recommend:" *Tibbets v. Tibbets*, 19 Ves. 656; Jac. 317; *Horwood v. West*, 1 S. & St. 387; *Ford v. Fowler*, 3 B. 146; *Malim v. Keighley*, 2 Ves. jun. 333, 529.

C. As to the interest taken by the donee in trust:

1. If there is a gift *subject* to trusts, the donee takes what-  
 ever is not required for the performance of those trusts.  
*Dawson v. Clarke*, 15 Ves. 409; 18 Ves. 247; *King v. Denison*,  
 1 V. & B. 261; *Fenton v. Hawkins*, 9 W. R. 300; *Clarke v.*  
*Hilton*, L. R. 2 Eq. 810.

Distinction  
between a  
gift subject  
to trusts and  
a gift upon  
trusts.

2. On the other hand, if the gift is *upon* trust, the donee takes the whole upon trust for the purposes declared; or for the heir at law or next of kin, if those purposes fail, or are not exhaustive or not declared. *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Countess of Bristol v. Hungerford*, *ib.* 645; *Kellett v. Kellett*, 1 Ba. & Be. 533; 3 Dow. 248; *Watson v.*

**Chap. XXXI.** *Hayes*, 5 M. & Cr. 125; *Mullen v. Bowman*, 1 Coll. 197  
*Andrews v. Andrews*, 1 Coll. 186; *Love v. Gaze*, 8 B. 472.

Gift upon  
condition may  
raise a trust.

It may be noticed, that a devise of property, upon condition of making certain payments out of it, which are shown on the face of the instrument, to exhaust the whole, is in effect a gift of the whole upon trust, and not subject to trusts. *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1; *A.-G. v. Merchant Taylors*, 6 Ch. 512; and see *Bird v. Harris*, 9 Eq. 204.

In what cases  
the donee  
takes the  
whole on  
trust.

3. Again, where the gift is to the donee indefinitely, without words expressly giving a beneficial interest, followed by precatory words, which raise a trust in favour of a particular class, the donee takes the whole in trust; as where the gift was to the testator's wife, under the firm conviction that she would dispose of and manage the same for the benefit of her children. *Barnes v. Grant*, 2 Jur. N. S. 1127; 26 L. J. Ch. 92; *Talbot v. O'Sullivan*, 6 L. R. Ir. 302; see *In re Rae's Estate*, 1 L. R. Ir. 174.

So a gift, without words of benefit superadded, for some particular purpose, whether declared or not, raises a trust as to the whole. *Corporation of Gloucester v. Wood*, 3 Ha. 131; 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419.

Where the gift is in trust, the fact that the donee is described as wife or relation of the testator, or that a legacy is given to the heir, will not entitle such donee to any beneficial interest. *Wyeh v. Packington*, 3 B. P. C. 44; *Wills v. Wills*, 1 Dr. & War. 439; *Starkey v. Brooks*, 1 P. W. 390.

Where a precatory trust is created in favour of a class, the donee may limit the shares of female members of the class to their separate use. *Willis v. Keymer*, 7 Ch. D. 181.

Cases where  
the donee in  
trust is in-  
tended to  
take some  
interest.

4. If words of benefit are superadded, if, for instance, the gift is to A. for his own use and benefit, or absolutely, followed by words which raise a trust, the donee takes beneficially, subject to those trusts. *Wood v. Cox*, 5 M. & Cr. 684; *Shelley v. Shelley*, 6 Eq. 540; *Irvine v. Sullivan*, 8 Eq. 673.

But the case is different if such words as "for her sole use and benefit" can be shown to be inserted merely for the purpose of excluding a husband from the trust, as in *Stubbs v. Sargon*, 2 Kee, 255; 3 M. & Cr. 507, where the gift was to A. for her

sole use and benefit, independent of her husband, for an express purpose. Chap. XXXI.

5. So though the gift may be upon trust, it may appear that the donee is intended to take some beneficial interest by the fact that the testator calls her his heiress, or expressly excludes his heir from any benefit. *Rogers v. Rogers*, 3 P. W. 193; *Hughes v. Evans*, 13 Sim. 496; see *Williams v. Roberts*, 27 L. J. Ch. 177; 4 Jur N. S. 18.

6. Again, the trust may not arise till the death of the donee upon trust, in which case he will take beneficially during his life. Cases where the trust does not arise till the death of the donee.

a. Where there are words of indefinite gift followed by a recommendation or entreaty that the donee will at his decease give the property to a certain class, this raises a trust subject to his life interest. *Pierson v. Garrett*, 2 B. C. C. 38, 226; *Malim v. Keighley*, 2 Ves. jun. 333, 529; *Cholmondeley v. Cholmondeley*, 14 Sim. 590; *Prevost v. Clarke*, 2 Mad. 458.

The same construction was adopted, where there was an intention that the donee was not to dispose of the capital in her lifetime, followed by a recommendation to give the property in a certain way. See *Horwood v. West*, 1 S. & St. 387.

b. So, too, where the gift is to A. *for his own sole use and benefit*, with an expression of desire or confidence that he will dispose of it among a certain class during his life and at his decease, the donee takes a life interest with a power of appointment by deed or will. *Harding v. Glyn*, 1 Atk. 469; *Evans v. Evans*, 12 W. R. 508; *Curnick v. Tucker*, 17 Eq. 320; *Fordham v. Speight*, 23 W. R. 782; *Le Marchant v. Le Marchant*, 18 Eq. 414; see, however, *In re Hutchinson & Tenant*, 8 Ch. D. 540.

c. And even where there was a gift to A. *to and for his sole use and benefit*, subsequent words, expressive of confidence that the donee would apply the same for her children *thereafter*, were held to give an interest for life with a power of appointment. *Gully v. Cregoe*, 24 B. 185.

And even in the absence of anything to show that the donee was intended to take a life interest, the same construction has been adopted. *Ware v. Mallard*, 21 L. J. Ch. 355; 16 Jur. 492; *Shovelton v. Shovelton*, 32 B. 143.

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Cases where  
the donee  
in trust is  
herself one of  
the objects of  
the trust.

*d.* Where a power is given to a person to dispose of property for herself and her children, she does not take an absolute interest. *Crockett v. Crockett*, 2 Ph. 553.

Nor will the legatee take absolutely where property is given to a legatee on trust for herself and her children: *Costabadie v. Costabadie*, 6 Ha. 410; *Godfrey v. Godfrey*, 11 W. R. 554; or to be applied for herself and her children: *Bibby v. Thompson*, 32 B. 646; or to be used for the benefit of herself and her children, at the discretion of the donee: *Hart v. Tribe*, 32 B. 279; 1 D. J. & S. 418; *Godfrey v. Godfrey*, 11 W. R. 554; *Newill v. Newill*, 7 Ch. 253; *Armstrong v. Armstrong*, 7 Eq. 518; see *Scott v. Key*, 13 W. R. 1030.

And even a life interest given to the testator's wife for the benefit of herself and her children is divisible equally among them. *Jubber v. Jubber*, 9 Sim. 503; see *Taylor v. Bacon*, 8 Sim. 100.

If, however, the gift is to A. with large powers of disposition or words of benefit added, the fact, that the gift is expressed to be for the benefit of herself and her children, will not raise a trust. *Lambe v. Eames*, 10 Eq. 267; 6 Ch. 597; *M'Alinden v. M'Alinden*, 1 R. 11 Eq. 219; *In re Hutchinson & Tenant*, 8 Ch. D. 540; *In re Adams*, 24 Ch. D. 199; 27 Ch. D. 394. See *Webb v. Wools*, 2 Sim. N. S. 267.

Distinction  
between trust  
and motive.

And where there is an absolute gift to A., a subsequent declaration that the benefit of A. and her children was the motive of the gift will raise no trust. *Thorp v. Owen*, 2 Ha. 607. See *Mackett v. Mackett*, 14 Eq. 49; *Briggs v. Sharp*, 20 Eq. 317.

Similarly a gift to enable a person to do something creates no trust. *Benson v. Whittam*, 5 Sim. 22; *Ryan v. Keogh*, 1 R. 4 Eq. 357; *Farr v. Hennis*, 44 L. T. 202. See *Biddles v. Biddles*, 16 Sim. 1; *quære*, whether *Byne v. Blackburn*, 26 B. 41, can stand on this ground.

Gifts to the  
parent to be  
applied for  
the main-  
tenance of his  
children.

Where the interest upon legacies given to children is directed to be paid to their parents, and applied by them for their maintenance, the parents take subject to no account. *Hammond v. Neame*, 1 Sw. 35; *Berkeley v. Swinburne*, 6 Sim. 613; *Hadow v. Hadow*, 9 Sim. 438; *Browne v. Paull*, 1 Sim. N. S. 92.

In the same way a gift to the parent for the benefit or maintenance of himself and his children may be safely paid to the parent. *Cooper v. Thornton*, 3 B. C. C. 96, 186; *Robinson v. Tickell*, 8 Ves. 142; *Re Robertson's Trust*, 6 W. R. 405. Chap. XXXI.

## VI. LEGACIES GIVEN TO BENEFIT A LEGATEE IN A PARTICULAR WAY.

1. A legacy given to a person for a particular purpose for the benefit of the legatee, as to bind him apprentice (a); to purchase a house (b); to establish a business (c); to purchase a commission (d); to pay off a mortgage (e); to carry on mines which the testator sells (f), is good though the purpose fails or becomes incapable of execution. *Barlow v. Grant*, 1 Vern. 255; *Nevill v. Nevill*, 2 Vern. 431; *Barton v. Cooke*, 5 Ves. 462 (a); *Knox v. Hotham*, 15 Sim. 82 (b); *Gough v. Bult*, 16 Sim. 45 (c); *Leche v. Lord Kilmorey*, T. & R. 207; *Palmer v. Flower*, 13 Eq. 250 (d); *Lockhart v. Hardy*, 9 B. 379 (e); *Parsons v. Coke*, 6 W. R. 715 (f). Legacy to a legatee to be applied in a particular way for the benefit of the legatee.

The legacy will not be cut down to the amount actually required for the named purpose, unless the surplus, after satisfying that purpose, is expressly given over. *In re Lee's Trusts*, L. R. 10 Eq. 157.

If a discretion is given to trustees to apply the interest and principal of a fund for the benefit of a legatee, with a gift over of so much as is not applied, and the trustees refuse to exercise their discretion, the whole fund belongs to the legatee. *Gude v. Worthington*, 3 De G. & Sm. 389; *Gough v. Bult*, 16 Sim. 45.

2. On the other hand, where a discretion is given to trustees to apply money to a particular purpose, the Court will inquire whether the occasion for the gift arises. *Lewis v. Lewis*, 1 Cox. 162; *Robinson v. Cleaton*, 15 Ves. 526; *Cowper v. Mantell*, 22 B. 231; *Sanderson's Trust*, 3 K. & J. 497; *Re Ward's Trust*, 7 Ch. 727. Discretion to trustees to apply money in a certain way for a legatee.

3. If the purpose for which the money is given is not merely the benefit of the legatee, but also the gratification of some Distinction where the purpose is not

Chap. XXXI. wish of the testator, the question is, which is the primary object. *Re Skinner's Trust*, 1 J. & H. 102.

merely the  
benefit of  
the legatee.  
Gift to pay  
a debt.

4. A gift expressed to be given from a certain motive, as, for instance, in discharge of a liability which does not exist, has in some cases been held to take effect. *Whitfield v. Clemment*, 1 Mer. 402; *Re Dyke*; *Dyke v. Dyke*, 44 L. T. 568.

## CHAPTER XXXII.

## GIFTS OF ANNUITIES.

## I. CHARACTERISTICS OF ANNUITIES.

AN annuity charged upon lands devised in fee is a legal rent-charge, even though it may be given to a person, his executors and administrators. *Ramsay v. Thorngate*, 16 Sim. 575. Chap. XXXII.  
Annuity and  
rent-charge  
distinguished.

In such a case the personality is not liable. *Patching v. Barnett*, 51 L. J. Ch. 74.

And a right to distrain is attached to it by statute 4 Geo. II. c. 28, s. 5. *Buttery v. Robinson*, 3 Bing. 392; *Sollory v. Leaver*, 9 Eq. 22; *Kelsey v. Kelsey*, 17 Eq. 496.

Where property is given subject to an annuity, the annuitant is not entitled to have the property sold and secured as long as the annuity is properly paid. *Re Potter; Potter v. Potter* 50 L. T. 8.

In *Sollory v. Leaver* it was held, that an annuitant whose annuity had fallen into arrear, was not entitled to a receiver, on the ground that he had a sufficient remedy by distress. A receiver would, however, probably now be appointed in such a case under section 25, sub-section 8, of the Judicature Act, 1873. Right to  
receiver.

An annuitant whose annuity is charged upon freeholds and residue is entitled to have the estate administered in order to ascertain the residue. *Wollaston v. Wollaston*, 7 Ch. D. 58. Right to  
administer.

A rent-charge, though charged upon realty and personality, will be looked upon as issuing out of the realty alone. *Butt's Case*, 4 Rep. 98, Pt. 7, 23 a; Co. Litt. 147a; *Richardson v. Nixon*, 7 Ir. Eq. 620; *Sollory v. Leaver*, 9 Eq. 22.

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The rule in Shelley's case applies to rent-charges.

The rule in *Shelley's Case* and the other technical rules of construction apply to the limitations of a rent-charge. *Drew v. Barry*, 1 R. 7 Eq. 413; 8 *ib.* 260.

A rent-charge is entailable, but if an estate tail is created in a rent-charge, and no remainder in fee is limited, the tenant in tail cannot create more than a base fee. Co. Litt. 298 *a*, note 2; *Chaplin v. Chaplin*, 3 P. Wms. 229.

Annuity to A. and his heirs.

An annuity, given out of personal assets, if given with words of inheritance, will devolve like real estate.

Annuities are not within the Statute de donis.

Such an annuity, however, not being within the *Statute de donis*, cannot be entailed. A devise, therefore, of a personal annuity to A. and the heirs of his body, gives A. a fee simple conditional. *Earl of Stafford v. Buckley*, 2 Ves. sen. 170; *Turner v. Turner*, Amb. 776; 1 B. C. C. 316.

Annuity given to a man and his heirs remains personalty except for purposes of devolution.

But an annuity, though given with words of inheritance, is, for all other purposes except descent, personalty. *Earl of Stafford v. Buckley*, 2 Ves. sen. 171; *Lady Holderness v. Lord Carmarthen*, 1 B. C. C. 377; *Aubin v. Daly*, 4 B. & Ald. 59; *Radburn v. Jervis*, 3 B. 450.

And an annuity charged upon real and personal estate, but given without words of limitation appropriate to realty, is personal estate. *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, 8 Eq. 260; *Joynt v. Richards*, 11 L. R. Ir. 278.

Direction to lay out sum in purchase of annuity.

A direction to lay out a specified sum in the purchase of an annuity for the life of A. vests that sum in the annuitant, whether the annuity is in possession or reversion. *Yates v. Compton*, 2 P. Wms. 308; *Barnes v. Rowley*, 3 Ves. 305; *Bayley v. Bishop*, 9 Ves. 6; *Palmer v. Craufurd*, 3 Sw. 482; see *Smith v. King*, 1 Russ. 363.

Direction to purchase annuity of certain amount.

So if there is a direction to purchase a Government annuity of a given amount, the annuitant is entitled to the purchase-money, though he may die before the time when the annuity was to be purchased. *Dawson v. Hearn*, 1 R. & M. 606; *Ford v. Batley*, 17 B. 303.

Upon the same principle a discretionary trust to purchase an annuity out of a fund, authorises advances to the legatee from time to time out of the capital of the fund. *Messeena v. Carr*, 9 Eq. 260.

A direction that the annuitant shall not be allowed to accept the value of the annuity in lieu thereof has been held ineffectual. *Stokes v. Cheek*, 28 B. 620. Chap. XXXII.  
Annuitant not to have value of his annuity.  
Discretionary trust.

A discretion vested in trustees to apply the annuity for the benefit of the annuitant in the event of her incapacity will not alter the rule. *Re Browne's Will*, 27 B. 324.

And a restraint upon anticipation will not deprive the annuitant of the right to the purchase-money, except in the case of a married woman. *Woodmeston v. Walker*, 2 R. & M. 197. Restraint upon anticipation.

Where a fund was bequeathed to purchase an annuity in the name of an annuitant, a declaration that the annuity should cease upon alienation was held not to take the case out of the rule. *Hunt Foulston v. Furber*, 3 Ch. D. 285. Cesser upon alienation.

Where a fund is directed to be laid out by trustees in the purchase of an annuity for the life of A., for his support and maintenance, with a gift over if he alienates it or becomes bankrupt, the cases are directly conflicting upon the question, whether the representatives of the annuitant are entitled to have the fund paid over, if the annuitant dies before the time when the annuity was to be purchased, without having alienated the annuity or become bankrupt. Gift over upon bankruptcy or alienation.

In *Day v. Day*, 1 Dr. 569, the fund was directed to be paid to the representatives of the annuitant, but this decision was not followed in *Power v. Hayne*, 8 Eq. 262; see *Hatton v. May*, 3 Ch. D. 148.

Though the gift over upon bankruptcy or alienation might prevent the annuitant himself from calling for a transfer of the fund, it would seem that his representatives ought to be entitled to the fund if the gift over does not take effect. See *Pearson v. Dolman*, 3 Eq. 315.

In the case of a gift of an annuity with a direction to set apart a fund to secure it, it is clear that the annuitant is not entitled to have the annuity valued and the value paid to him. *Wright v. Callender*, 2 D. M. & G. 652; *Miner v. Baldwin*, 1 Sm. & G. 522. Annuitant is not entitled to the value of his annuity.

If, however, the testator's estate is being administered by the Court and proves insufficient to pay the legacies and annuities Deficient estate under administration.

Chap. XXXII. given, so that an abatement is necessary, a value will be put upon the annuities as from the testator's death, and the annuitant or his representatives will be entitled to the valued amount after abatement. *Wroughton v. Colquhoun*, 1 De G. & S. 357; *Carr v. Ingleby*, *ib.* 362; *Long v. Hughes*, *ib.* 364.

This principle applies only where the estate is being administered. *In re Nicholson's Estate*, I. R. 11 Eq. 177.

It does not apply to annuities determinable on marriage or bankruptcy. *Carr v. Ingleby*, *supra*; *Gratrix v. Chambers*, 2 Giff. 321.

If the annuity is charged upon corpus, the tenant for life of the corpus is not entitled to have the annuity valued and the amount paid out of corpus; but sufficient portions of the corpus must be sold from time to time to satisfy the annuity. *In re Grant*; *Walker v. Martineau*, 31 W. R. 703.

## II. THE DURATION OF GIFTS OF ANNUITIES AND ANNUAL SUMS.

Annuity  
whether for  
life or  
perpetual.

1. When an annuity is given to a person without more, the question arises, whether it was meant to be for life only, or perpetual; and this point, in the case of annuities created *de novo*, is unaffected by sect. 28 of the Wills Act. *Nicholls v. Hawkes*, 10 Ha. 342.

In the case of a deed, it has been decided, that a grant of an annuity given without words of limitation and charged upon freeholds, gives a life interest. The same rule applies if the annuity is charged on freeholds and chattels real. *Butt's Case*, 7 Rep. 23 a; *In re Gillman's Estate*, I. R. 10 Eq. 92.

Whether a grant of an annuity without words of limitation charged upon a chattel interest would endure beyond the life of the annuitant, if he dies during the term, is doubtful. Cases *supra*.

*Prima facie* a  
gift of an  
annuity is for  
life only.

In the case of wills the presumption is, that an annuity given simply is for life only, whether it is given to a single legatee, or to A. for life, and then to B. simply, or to A. with power to give it after his death to another, or to several others and the

survivor. *Blewitt v. Roberts*, 10 Sim. 491; Cr. & Ph. 274; Chap. XXXII  
*Yates v. Maden*, 3 Mac. & G. 532; *Blight v. Hartnoll*, 19 Ch.  
 D. 294; *Whitten v. Hanlon*, 16 L. R. Ir. 298.

An annuity given for education and maintenance cannot endure beyond the life of the annuitants. *Wilkins v. Jodrell*, 13 Ch. D. 564; see p. 371, *post*.

But an intention may be gathered from the will, that the annuity is to be perpetual, and no particular words of limitation are necessary for this purpose. Thus:

a. An annuity is perpetual, if there is a gift of property to produce it. *Stokes v. Heron*, 12 Cl. & F. 161; *Hicks v. Ross*, 14 Eq. 141. Gift of property to produce annuity.

b. It is said that a direction to purchase an annuity of a given amount is equivalent to a direction to purchase a perpetual annuity, and the case of *Ross v. Borer*, 2 J. & H. 469, decided on the authority of *Kerr v. Middlesex Hospital*, 2 D. M. & G. 576, seems to go the full length of this proposition. On principle, however, it is difficult to see in what respect a direction to purchase an annuity can be distinguished from a mere gift of an annuity. Direction to purchase annuity.

Of course, if there is a dedication of a part or the whole of the testator's property to produce an annuity, this may in effect be a gift of so much property as will produce the annual amount, as in *Stokes v. Heron*, 12 Cl. & F. 161, where there were other circumstances which tended to show that the annuities were to be perpetual. See *Wakeham v. Merrick*, 37 L. J. Ch. 45. Dedication of property.

Or, again, the testator may distribute the whole of his estate in the form of gifts of annual sums or annuities to different legatees, as in *Kerr v. Middlesex Hospital*, 2 D. M. & G. 576, where the fact that one of the gifts of a certain annual income was to the Middlesex Hospital was strong evidence to show that other annuities given in very similar language were intended to be perpetual. See, too, *Hicks v. Ross*, 14 Eq. 141.

But it may be doubted whether the proposition, that a direction to purchase an annuity gives a perpetual annuity, laid down in *Kerr v. Middlesex Hospital*, and *Ross v. Borer*, will be acquiesced in.

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At any rate a direction to invest a sum in Government securities sufficient to produce a certain annual sum which is given to an annuitant, gives only a life interest. *Re Grove's Trusts*, 1 Giff. 74; *Re Taber*; *Arnold v. Kayess*, 46 L. T. 805; 30 W. R. 883; 51 L. J. Ch. 721; see *Banks v. Braithwaite*, 11 W. R. 398; 32 L. J. Ch. 35, 198.

Gift of part of annual income of a fund.

c. If the annuity is given as part of the income of a particular fund, it amounts to a gift of so much of the fund itself. *Bignold v. Giles*, 4 Dr. 343; *Courtenay v. Gallagher*, 5 Ir. Ch. 154, 356; *Rawlings v. Jennings*, 13 Ves. 39; *Potter v. Baker*, 13 B. 273; 15 B. 489; *Bent v. Cullen*, 6 Ch. 235; see *Evans v. Walker*, 3 Ch. D. 211.

Possibly a gift of so much a year would be considered a gift of the capital producing the annual sum. See *Hill v. Rattey*, 2 J. & H. 634.

Where a testator bequeathed to his daughter on her marriage a sum of stock producing a certain annual sum, and gave her out of his general dividends an annual sum to make up the income to £400, the latter gift was held to be a gift of capital producing the necessary income. *Engelhardt v. Engelhardt*, 26 W. R. 853.

Gift of testator's property to pay an annuity will not make it perpetual.

d. But a mere devise of all the testator's property on trust to pay an annuity, or a charge on a certain fund, will not make the annuity perpetual. *Lett v. Randall*, 3 Sm. & G. 83; 2 D. F. & J. 388; *Sullivan v. Galbraith*, 1 R. 4 Eq. 582; *Wilson v. Maddison*, 2 Y. & C. C. 372. See *Innes v. Mitchell*, 6 Ves. 464; 9 Ves. 212.

Direction for ceasing or sale at a certain time.

e. If the annuity is directed to cease if the legatee dies without issue, or is directed not to be sold till after the death of the legatee, there is a strong argument that it was meant to be perpetual. *Hedges v. Harpur*, 3 De G. & J. 129; *Pawson v. Pawson*, 19 B. 146.

Powers of appointing the annuity in fee.

f. Or again, if the legatee has a power of appointing the annuity in words that would authorise the appointment of a perpetual annuity, or the annuity is given over in certain events in fee, the same argument arises. *Wright v. Wright*, 12 Ir. Ch. 401; *Robinson v. Hunt*, 4 B. 450.

Limitations

g. And if the annuity, being given to several persons as

tenants in common, is given over in its entirety at a period Chap. XXXII.  
 when, if it were only for the life of the legatees it might have  
 partially determined, it will be perpetual, as it would be inconsistent with a mere life interest.  
 absurd to suppose that it is to cease upon the death of a prior  
 annuitant and to revive again in certain events. *Mansergh*  
*v. Campbell*, 3 De G. & J. 237; *Barden v. Meagher*, I. R. 1 Eq.  
 246.

*h.* In *Parsons v. Parsons*, 8 Eq. 260, an annuity, given to Gift of an annuity to several or their heirs.  
 several or their heirs, was held to be perpetual, though the heirs  
 took by substitution.

2. A devise to A. and B. for their lives is equivalent to a Devise to A. and B. for life.  
 devise to them and the survivor of them.

So a devise to A. during the life of B. and C. continues  
 during the joint lives of B. and C. and the survivor of them.

But a devise to A. for a term if B. and C. so long live, deter-  
 mines by the death of B. or C. *Brudnell's Case*, 5 Co. 9; *Day*  
*v. Day, Kay*, 703.

### 3. Implication of survivorship between annuitants:

A bequest of an annuity to two persons for their lives goes to Gift of an annuity to two persons for their lives.  
 the survivor for his life, though the annuitants may be husband  
 and wife. *Moffat v. Burnie*, 18 B. 211; *Neighbour v. Thur-*  
*low*, 28 B. 33; *Alder v. Lawless*, 32 B. 72. See *Day v. Day,*  
*Kay*, 703.

As to the construction of a bequest of an annuity to two Gift to two persons as tenants in common for their lives.  
 persons as tenants in common for their lives without more, see  
*Lill v. Lill*, 23 B. 446; *Grant v. Winbolt*, 2 W. R. 151; 23 L.  
 J. Ch. 282.

Where the gift is to two persons as tenants in common for  
 their lives, with a gift over after their death:

*a.* If the gift over is expressly after the death of the survivor, Gift over after the death of the survivor.  
 benefit of survivorship will be implied between the annuitants.  
*Armstrong v. Eldridge*, 3 B. C. C. 215.

*b.* So, if the gift over is not till after the death of both, or the Gift over after the death of all the tenants for life.  
 whole is given after their death as one undivided fund, the  
 survivor will take the whole. *Tuckerman v. Jeffries*, 3 Bac.  
 Abr. ed. Gw. 681; 11 Mod. 108; *M'Dermott v. Wallace*, 5 B.  
 142; *Draycott v. Wood*, 8 L. T. N. S. 304.

The same rule applies though the gift is expressly to A. and

**Chap. XXXII.** B. for their *joint* lives, if nothing is given over till after the decease of both. *Townley v. Bolton*, 1 M. & K. 148.

Gift over after the death of the annuitants and a third person.

c. This implication of survivorship, however, does not arise, where the gift over is not merely after the death of the annuitants, but after the death of the annuitants and some other person who cannot have been intended to take by survivorship. *Re Drakeley's Estate*, 19 B. 395.

Nor can it arise, where the shares of legatees dying are expressly disposed of during the period between the death of each and the death of all. *Walmsley v. Foxall*, 1 D. J. & S. 605.

Meaning of "every."

As to the meaning of "every" in a gift over after the death of every of the annuitants, see *Brown v. Jarvis*, 2 D. F. & J. 168.

Cases where the gift over is to the children of the tenants for life.

d. If the gift over is to the children of the annuitants, the most obvious construction is, that the share of each goes over immediately on his death to his children. *Sutcliffe v. Howard*, 38 L. J. Ch. 472. See pp. 239, 240, *ante*.

But if it is clear that nothing is given to the children till after the death of all the tenants for life, the survivor takes the whole. *Begley v. Cooke*, 3 Dr. 662; *Alt v. Gregory*, 8 D. M. & G. 221. See *Minton v. Minton*, 9 W. R. 586.

Arguments in favour of postponing distribution till the death of the surviving tenant for life.

In such cases the fact that the distribution is to be *per capita*, and not *per stirpes*, would be an argument, that the distribution was to be postponed till the death of the surviving tenant for life. See *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; 2 W. R. 672.

It seems also that if the gift after the death of the annuitants is to their heirs *per capita*, this would afford a strong argument for implying a life interest in the surviving annuitants; but the case is different if the gift over is to the heirs of the annuitants and of other persons. *Hensley v. Wills*, 14 W. R. 423.

There can be no implication of survivorship where the duration of the annuity is clearly defined by the original gift.

e. Where, however, the duration of the annuity is clearly defined by the original gift, as for instance, where the gift is to several as tenants in common for their lives and the life of the survivor, the shares of those dying during the duration of the annuity pass to their representatives. *Jones v. Randall*, 1 J. & W. 100; *Eales v. Cardigan*, 9 Sim. 384; *Bryan v. Twigg*, L. R. 3 Eq. 433; 3 Ch. 183; *Chatfield v. Berchtoldt*, 18 W. R.

887; see *Rownd v. Pickett*, 47 L. J. Ch. 631; *Kelsey v. Ellis*, Chap. XXXII. 38 L. T. N. S. 471.

It is submitted, that in such a case a gift over after the death of the survivor of the annuitants can have no influence on the construction; see, however, the decree of Sir W. Grant, referred to in *Avern v. Lloyd*, 5 Eq. 383; p. 384.

There may, however, in such a case, be words to show that the survivor was to take the whole. Thus, if the gift is to several as tenants in common "for their lives, or the life of the survivor, for *their or her* absolute use," or "for their lives and the life of the survivor during *their and her* natural life," the additional words show that the survivor was meant to take the whole. *Hatton v. Finch*, 4 B. 186; *Cranswick v. Pearson*, 31 B. 624; affd. 9 L. T. N. S. 275; and in *Doe d. Borwell v. Abey*, 1 Mau. & S. 428, the gift over "from and after their *respective deceases* and the decease of the survivor," indicated that the representatives of annuitants were not to take anything after their respective deaths.

4. Distinction between annuities given for a period and for an object:

An annuity given to a person for a fixed period for maintenance is not determined by the attainment of majority, or by death before that period. *Badham v. Mee*, 1 R. & M. 631; *Longmore v. Elcum*, 2 Y. & C. C. 363; *Lewes v. Lewes*, 16 Sim. 266; *Atwood v. Alford*, L. R. 2 Eq. 479; *In re Ord*; *Dickinson v. Dickinson*, 9 Ch. D. 667; 12 Ch. D. 22; see *In re Hudson*; *Hudson v. Hudson*, 20 Ch. D. 406.

This, however, does not apply where the duration of the annuity is merely the duration of the legal estate: if, for instance, the annuity is given to trustees for their lives, and the life of the longest liver of them, for the support of A. *Ryan v. Keogh*, 1 R. 4. Eq. 357.

The gift of an annual sum for maintenance and education is not to be limited to minority, but creates a life interest. *Soames v. Martin*, 10 Sim. 287; *Wilkins v. Jodrell*, 13 Ch. D. 564; see *Frewen v. Hamilton*, 47 L. J. Ch. 391; see p. 367, ante.

In *Gardner v. Barber*, 18 Jur. 508, an annuity for main-

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Annuity to trustee for his trouble.

A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee under the will, or for his trouble, ceases with the active trusts, not necessarily with a judgment for administration. *Baker v. Martin*, 8 Sim. 25; *Hull v. Christian*, 17 Eq. 546; *M'Dermot v. O'Connor*, 1 R. 10 Eq. 352; *Clay v. Coles*, W. N. 1880, 145; *Henrion v. Bonham*, Dru. t. Sug. 476.

Gift to a person during the minority of an infant.

It is clear that a gift of rents and profits to a parent during the minority of a child, where no benefit is intended for the child, will go to the representatives of the parent if he dies during the minority. *Smith v. Havers*, Cro. Eliz. 252; *Laxton v. Eedle*, 19 B. 321.

On the other hand, if the child dies during his minority, the parent will, nevertheless, be entitled to the rents and profits till the time when the child, if living, would have attained twenty-one, if the object of the gift is payment of debts. *Carter v. Church*, 1 Ch. Ca. 113; *Boraston's Case*, 3 Co. 19 a.

And it would seem that the construction would be the same if the object of the term is the benefit of the person to whom the rents and profits are given during the minority. *Coates v. Needham*, 2 Vern. 65. See 1 Jarm. 581.

On the other hand, if the term is created for the benefit of the child, or if the object of it is merely to postpone the interest of the child till he should have performed some condition, which could not be performed after his death, the term will determine with his life. See *Manfield v. Dugard*, 1 Eq. Ca. Abr. 194, pl. 4, where the report is very unsatisfactory. *Lomax v. Holmedon*, 3 P. W. 176; and see *Castle v. Eate*, 7 B. 296; *Goodright d. Revell v. Parker*, 1 M. & S. 692.

## CHAPTER XXXIII.

## CONDITIONS PRECEDENT—VESTING.

## CONDITIONS DISTINGUISHED.

1. THE Court is never astute to construe a testator's words as importing a condition if a different meaning can be fairly given to them. Chap.  
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Thus, a devise "upon condition" that the devisee makes certain payments within a given time will, as a rule, be construed as a trust, and not as a condition. *Young v. Grove*, 4 C. B. 668; *Wright v. Wilkin*, 9 W. R. 161; 10 W. R. 403; see *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1; *A.-G. v. Merchant Taylors*, 6 Ch. 512; and see *Bird v. Harris*, 9 Eq. 204; *Foot v. Cunningham*, 1 R. 11 Eq. 306. Condition and  
trust.

2. In some cases a condition apparently precedent has been read as forming part of the original limitation. Thus, a devise to M. and the heirs of her body, on condition that she marry and have issue male by S., was held to give an estate in special tail to M. *Page v. Hayward*, 2 Salk. 570. Condition and  
limitation.

Similarly, an estate to arise upon a condition, which cuts down a previous estate will, if possible, be construed as a remainder by looking upon the condition as forming part of the limitation of the previous estate. Thus, a devise to A. for life if she should not marry again, but if she should, to B., will be construed as a devise to A. for life or till marriage. *Luxford v. Cheek*, 3 Lev. 125; *Lady Ann Fry's Case*, 1 Ventr. 203; *Gordon v. Adolphus*, 3 B. P. C. 306.

So, too, if the gift for life is made "subject to the proviso hereinafter contained," the proviso is incorporated into the original limitation. *Webb v. Grace*, 2 Ph. 701. Devise for life  
subject to a  
proviso.

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And a bequest to A. for life, if she should so long remain unmarried, will be construed in the same way. *Heath v. Lewis*, 3 D. M. & G. 954.

On the other hand, if the condition is so penned that it cannot be connected with the previous limitation for life, it must take effect as a condition. *Sheffield v. Lord Orrery*, 3 Atk. 282; see *Allen v. Jackson*, 1 Ch. D. 399.

In such a case, however, it may appear that the original estate was only meant to last till the condition takes effect, if, for instance, the rents are directed to be paid to a woman, which could only be done till her marriage, the estate not being given to her separate use. *Meeds v. Wood*, 19 B. 215.

Estate of  
trustees to  
preserve.

Upon the same principle, the ordinary limitation to trustees to preserve contingent remainders is a vested remainder, the prior estate being looked upon as lasting till forfeiture by the prior taker. *Smith d. Dormer v. Parkhurst*, 18 Viner, fol. 413; 3 Atk. 135; 4 B. P. C. 353.

### CHARACTERISTICS OF CONDITIONS PRECEDENT.

General test  
of condition  
precedent.

Whether a condition is subsequent or precedent must depend on the language in which it is framed, and very little help can be derived from decided cases on the point. It may, however, be noticed, that when the condition requires something to be done, which will take time, the argument is in favour of construing it as a condition subsequent. *Popham v. Bampfild*, 1 Vern. 79; 1 Eq. Ab. 108, pl. 2; *Peyton v. Bury*, 2 P. W. 626 *Duddy v. Gresham*, 2 L. R. Ir. 443.

On the other hand, a condition, which involves anything in the nature of consideration, is in general a condition precedent. *Acherley v. Vernon*, Willes, 153; *In re Wellstead*, 25 B. 612.

Condition  
precedent  
whether im-  
possible, im-  
politic, or  
illegal, must  
be fulfilled in  
the case of  
realty.

If a devise be made to take effect only on performance of some particular duty by the devisee, or upon some particular event, there is no gift unless the condition is fulfilled. And it makes no difference that the event is impossible, impolitic, or illegal. See *Egerton v. Earl of Brownlow*, 4 H. L. 1; *Priestley v. Holgate*, 3 K. & J. 286; see *Caldwell v. Cresswell*, 6 Ch. 278.

But as regards personalty, a gift made upon a condition precedent involving a physical impossibility, such as to drink up the ocean, takes effect notwithstanding the condition. See 1 Swin., Part IV., sec. 6, p. 257; Co. Lit. 206 b.

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—  
In personalty  
condition  
precedent in-  
volving a  
physical im-  
possibility is  
invalid.

But if the condition precedent, though in fact impossible at the date of the will, or becoming impossible by subsequent events, involves no physical impossibility, the gift will not take effect. *Lowther v. Cavendish*, 1 Ed. 99, 116; *Robinson v. Wheelwright*, 21 B. 214; 6 D. M. & G. 535.

As regards realty and personalty, a condition precedent which becomes impossible by the act of the testator is discharged. Co. Lit. 206 b., sec. 334; *Gath v. Barton*, 1 B. 478; *Darley v. Langworthy*, 3 B. P. C. 359.

Condition dis-  
charged by  
testator.

In personalty a condition precedent which is *contra bonos mores* may be rejected, leaving the gift absolute. *Brown v. Peck*, 1 Ed. 140; *Wren v. Bradley*, 2 De G. & Sm. 49.

Condition  
*contra bonos  
mores*.

## VESTING OF REAL ESTATE.

The Courts lean strongly in favour of early vesting. "Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates or the rents and profits of such estates. Such estates must descend to the heir, if they are not given to any person to hold until the events happen on which they are to become vested. Testators who create contingent estates often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention, and not from the bounty of, the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained

General lean-  
ing in favour  
of vesting.

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while estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience and sometimes of injury to them. If the attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age, children lose estates which were intended for them, and which their relation to the testator may give them the strongest claim to." *Per Best, C. J., Duffield v. Duffield*, 3 Bl. N. S. 330; 1 Dow. N. S. 310.

Devise  
"when" or  
"if" is con-  
tingent.

A devise to A. and his heirs "if" or "when" he attains twenty-one is contingent according to the opinion of Fearne, Post. Works, 191. So, too, "a devise in remainder to a class of children if they attain twenty-one is a contingent remainder. It is also a contingent remainder if it be a devise to a class of children equally at the age of twenty-one. And so also it is a contingent remainder if it be a devise in remainder to children who shall attain the age of twenty-one." *Per Stuart, V.-C., in Browne v. Browne*, 3 Sm. & G. 587; *Alexander v. Alexander*, 16 C. B. 59; *Love v. Love*, 7 L. R. Ir. 306; see *Jull v. Jacobs*, 3 Ch. D. 703.

Condition  
requiring the  
attainment of  
a certain age  
may some-  
times be  
subsequent.

Cases, however, where the condition as to attaining a certain age forms part of the original devise, must be distinguished from those cases, where the condition is contained in a separate direction; thus, where there has been an immediate devise followed by a clause directing that the devisee "is not to be of age to receive this" till he attains a certain age, or that it is to become his property on attaining twenty-five, the devisee has taken a vested interest subject to be divested. *Snow v. Poulden*, 1 Kee. 186; *Altwater v. Altwater*, 18 B. 330.

So, too, a devise to A., provided she lives to attain twenty-one, has been held vested subject to be divested. *Simmonds v. Cocke*, 29 B. 455, where the devise was after a life estate.

Express direc-  
tion as to  
vesting.

Of course, when there is an express direction as to the period of vesting, nothing can vest before the appointed time; though on the other hand the question of vesting is not affected by a direction merely referring to the period of possession. *Russell v. Buchanan*, 2 Cr. & M. 561; 7 Sim. 628; *Montgomerie v. Woodley*, 5 Ves. 522; *Shrimpton v. Shrimpton*, 31 B. 425.

A devise to A., at or when or if he attain twenty-one will be vested :

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1. If an estate is given prior to the attainment of twenty-one by the ultimate devisee to some third person either for the benefit of the devisee himself, or for the benefit of some other persons to endure during the minority. *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228; *Re Mottram*, 10 Jur. N. S. 915; *Boruston's Case*, 3 Rep. 19 a; *Manfield v. Dugard*, 1 Eq. Ab. 195, pl. 4.

Cases in which a devise to A. at or when or if he attain 21 is vested.  
Prior devise till A. attain 21.

In this case the estate given to the devisee on attaining twenty-one is in fact a vested interest subject to a term.

2. A devise to A. for life, and *from and after* his decease to B., if he shall have attained twenty-one years, or so soon as he shall arrive at that age, was, in *Andrew v. Andrew*, 1 Ch. D. 410, held to give B. a vested interest at birth, owing to the words "from and after," which were held to mean immediately after; but see *Alexander v. Alexander*, 16 C. B. 59.

Prior devise for life.

Whether a devise in remainder after a life estate to B. if he attains twenty-one in the absence of the words "from and after" would give B. a vested interest subject to be divested seems doubtful, though the remarks in *Andrew v. Andrew*, *supra*, are in favour of such a construction; but see *Blugrove v. Hancock*, 16 Sim. 371; *Simmonds v. Cocks*, 29 B. 455.

3. However, if there is a gift over upon death under twenty-one, the gift over shows that the first devisee is to take whatever interest the person claiming under the devise over is not entitled to, that is to say, the immediate interest. *Bromfield v. Crowder*, 1 B. & P. N. R. 313; see 14 East, 604; *Doe d. Roake v. Newell*, 1 Mau. & S. 327; 5 Dow. 202; *Edwards v. Hammond*, 3 Lev. 132; *Doe d. Hunt v. Moore*, 14 East, 601; *Phipps v. Ackers*, 3 Cl. & Fin. 691; 9 *ib.* 583; *Whitter v. Brennridge*, L. R. 2 Eq. 736.

Gift over upon death under 21.

And the argument in favour of vesting is still stronger, if the gift over is upon death before the given time without issue. *Finch v. Lane*, 10 Eq. 501.

The attainment by the devisees of the given age is a certainty provided they live long enough; if, however, the contingency is some other event, as remainder to A. if he survives B., the

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estate is not vested till the event happens, notwithstanding the gift over. *Doe d. Planner v. Scudamore*, 2 B. & P. 289; *Price v. Hall*, 5 Eq. 399.

And of course the gift over can have no effect where there is an express direction as to the time of vesting. *Russell v. Buchanan*, 2 Cr. & Mee. 561; 7 Sim. 628.

Devise to a contingent class and to a class upon a contingency.

4. There is, however, an important distinction between a devise to definite persons or to a class, which is clearly and satisfactorily ascertained at twenty-one, and a devise to such of a class as attain twenty-one, or to those who attain twenty-one. In the latter case "the finding or not finding the legatee depends on his attaining a particular qualification, and till the contingency happens, there is no one to whom the doctrine laid down in *Phipps v. Ackers*, can apply." Such a devise, therefore, will not be vested by a gift over. *Duffield v. Duffield*, 3 Bl. N. S. 260; *Stephen v. Stephen*, Cases Temp. talb. 228; *Festing v. Allen*, 12 M. & W. 279; *Holmes v. Prescott*, 10 Jur. N. S. 507; 33 L. J. Ch. 264; 11 L. T. N. S. 38; 12 W. R. 636; 3 N. R. 559; *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; 13 W. R. 800; *Price v. Hall*, 5 Eq. 399; *Eddel's Trust*, 11 Eq. 559; *Patching v. Barnett*, 28 W. R. 886. *Riley v. Garnett*, 3 De G. & S. 629, and *Browne v. Browne*, 3 Sm. & G. 568, will probably not be followed.

But a devise to A. for life, and if he leave a son born or to be born in due time after his decease, who should live to attain twenty-one, then to such son in fee if he attain twenty-one, with a gift over if A. die without leaving a son who should attain twenty-one, has been held to give an infant son of A. a vested estate subject to be divested, otherwise a child born within nine months of A.'s death could never take. *Muskett v. Eaton*, 1 Ch. D. 435; see, too, *Doe v. Hopkinson*, 5 Q. B. 223.

An estate to commence in certain events fails unless the events happen.

5. An estate limited to commence in certain specified events will fail altogether unless those exact events happen. Thus a gift, "if A. shall die, living my wife, without leaving a widow or any child, after his death and my wife's" to B., will fail if A. survives the testator's wife, though he may die without leaving a widow or child. *Holmes v. Cradock*, 3 Ves. 317; *Shuldham v. Smith*, 6 Dow. 22; *Dicken v. Clarke*, 2 Y. & C. Ex. 572.

So if a testator recites that he will be entitled to property in certain events, and disposes of it, if those events happen, the property passes only if those events happen, though in fact, he may be entitled to the property in other events as well.

*Archbold v. Austin Gourlay*, 5 L. R. Ir. 214.

But in the case of successive limitations "where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent on a condition essential to the determination of the interests previously limited, notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interests previously limited."

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Where the contingency imports no more than the determination of prior interests the estate is vested.

*Maddison v. Chapman*, 4 K. & J. 709, 719; 3 De G. & J. 536; *Webb v. Haring*, Cro. Jac. 415; *Pearsall v. Simpson*, 15 Ves. 29; *Franks v. Price*, 3 B. 182; 5 Bing. N. C. 37; 6 Sc. 710; *Chellen v. Martin*, 21 W. R. 671; *Edgeworth v. Edgeworth*, L. R. 4 H. L. 35; see *post*, p. 445.

Thus, if the devise is to A. for life remainder to B. for life and on the decease of B., if A. be dead, to C. in fee, C. takes a vested remainder whether B. survives A. or not. Cases, *supra*; see, too, *Key v. Key*, 4 D. M. & G. 73; *In re Betty Smith's Trusts*, L. R. 1 Eq. 79.

So a devise in remainder to a person for his life, if he shall be living when the prior limitations determine, is not contingent, nor will subsequent remainders be contingent upon the survivorship of the tenant for life. *Leadbeater v. Cross*, 2 Q. B. D. 18.

But to admit this construction, the limitation over must involve no incident, but what is essential to the determination of the estates previously limited. *Maddison v. Chapman*, 4 K. & J. 709; 3 De G. & J. 536.

Limits of the doctrine.

6. A contingent interest is of course transmissible, and the death of the devisee before the event happens does not prevent the interest from vesting in him or his estate, if his being alive is not one of the conditions of the gift over taking effect. *In re Creswell*; *Parkin v. Creswell*, 24 Ch. D. 102.

Contingent interest transmissible.

7. It is now settled, that when there is a gift to a person for life, if she so long remains unmarried, or for life until bank-

Estates to arise upon the deter-

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mination of a  
prior life  
estate by  
marriage or  
bankruptcy  
take effect as  
vested re-  
mainders.

ruptcy, followed by a gift over in the event of marriage or bankruptcy, the remainder is not contingent, but vested so as to take effect either upon the death or marriage or bankruptcy, as the case may be, of the tenant for life. *Luxford v. Cheeke*, 3 Lev. 125; *Lady Ann Fry's Case*, 1 Vent. 199; *Gordon v. Adolphus*, 3 B. P. C. 306; *Foster v. Lord Romney*, 11 East, 594; *Meeds v. Wood*, 19 B. 215; *Browne v. Hammond*, Jo. 210; *Eaton v. Hewitt*, 2 Dr. & S. 184; *Wardroper v. Cutfield*, 12 W. R. 458; *Walpole v. Laslett*, 7 L. T. N. S. 526; 1 N. R. 180; *Etches v. Etches*, 3 Dr. 440.

*Pile v. Sa'ter*. In *Pile v. Salter*, 5 Sim. 411, it was held, that the fact of the gift over being in the event of marriage to the tenant for life, together with others, would prevent this construction. This case, however, was not followed in *Underhill v. Roden*, 2 Ch. D. 494.

But this construction only applies where the ulterior limitation is a remainder, the event upon which it is to take effect being incorporated into the prior limitation for life, and not where the prior life estate is to be cut down in the event of the marriage of the tenant for life. *Sheffield v. Lord Orrery*, 3 Atk. 282.

If a sum is given to a legatee with a direction, that the interest shall be for her separate use for life and while she continues unmarried, with a gift over if she marries, the gift over only takes effect in that event. *McCulloch v. McCulloch*, 10 W. R. 515; 3 Giff. 606.

Under a devise to a wife for life provided she remains a widow, but in case she marries again to A. when he attains twenty-three, the wife was held entitled till A. attained twenty-three, though she married again. *Doe v. Freeman*, 1 T. R. 389. See *Re Cubburn*; *Gage v. Rutland*, 46 L. T. 848.

#### VESTING OF CHARGES ON LAND.

Legacies  
charged on  
land do not  
vest before  
they are  
payable.

The vesting of legacies charged upon real estate is governed by rules derived from the common law.

"If a sum of money be given to a person charged upon real estate, and that person, being an infant, is not to have the legacy

immediately, but it is given at twenty-one or payable at twenty-one, if the child does not attain twenty-one the legacy is not raisable." *Parker v. Hodgson*, 1 Dr. & Sm. 568; see *Brown v. Wooller*, 2 Y. & C. C. 134.

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But if the payment is postponed for purposes not referrible to the person of the legatee, but only for the convenience of the estate, as, for instance, in the case of a life tenancy, the legacies vest before the time of payment. *Evans v. Scott*, 1 H. L. 57; *King v. Withers*, Ca. temp Talb. 116; see *In re Brabazon*, 13 Ir. Eq. 156; *In re Neary's Estate*, 7 L. R. Ir. 311.

Distinction between postponement of payment for the purposes of the estate and of the legatee.

It makes no difference, whether the legacies subject to a life interest are made payable at twenty-one or not, though it seems that they will not in any case vest before then. *Remnant v. Hood*, 2 D. F. & J. 396; *Davies v. Huguenin*, 1 H. & M. 730.

And a legacy charged upon land and directed to be paid upon an event which may or may not happen, for instance, when the testator's eldest son should come into possession of a settled estate, will fail if the event does not happen. *Taylor v. Lambert*, 2 Ch. D. 177.

Legacy payable upon an event which may never happen is contingent.

If a legacy is charged upon real and personal estate, the personal estate is the primary fund for payment, and so far as the personal estate extends, the vesting is governed by the rules applicable to personal estate, but so far as the legacy is payable out of realty the rules with regard to legacies charged upon land apply. *Duke of Chandos v. Talbot*, 2 P. W. 601, 612; *Prowse v. Abingdon*, 1 Atk. 481; *In re Hudsons*, Dru. t. Sugd. 6.

Legacy charged upon real and personal estate follows proportionally the rules applicable to realty and personalty.

In the case of a power, if the donee is authorised to fix the times at which portions are to vest, he can direct a portion to vest at once, and it will in that case be raisable though the child dies under twenty-one. *Henty v. Wrey*, 21 Ch. D. 332, where the subject of the vesting of portions is fully discussed.

## VESTING OF BEQUESTS OF PERSONALTY.

The vesting of bequests of personalty, including chattels real, is governed by rules derived from the civil law. These rules

Vesting of personalty is

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governed by  
the civil law.

Meaning of  
"vest."

Direction as  
to vesting is  
imperative.

Gift over upon  
death before  
the time of  
vesting will  
not alter the  
meaning of  
the word vest.

When  
"vested"  
means "pay-  
able."

Gift over  
upon death  
without issue  
before the  
time of  
vesting.

Shares treated  
as vested  
before the  
time ap-  
pointed.

apply also to realty directed to be converted. *In re Hudsons*, Dru. t. Sugd. 6; *Hurt's Trusts*, 3 De G. & J. 195.

I. When there is an express direction as to the period of vesting:

It has been said that the word "vest," being derived from "vestire," naturally refers to vesting in possession, and not to vesting in interest. *Young v. Robertson*, 4 Macq. 314. This is, however, contrary to the whole current of English authority, according to which the word "vest" has always been held to refer *primâ facie* to vesting in interest or transmissibility, and not vesting in possession or indefeasibility.

Thus, when there is a direction that the gifts are to be vested at a certain period, the legatee will take no interest till then.

Where the interests of legatees are to be vested at twenty-one, a gift over upon death under twenty-one, or upon death before the time of vesting, will not affect the natural meaning of the word. *Glanvil v. Glanvil*, 2 Mer. 38; *Comport v. Austen*, 12 Sim. 218; *Griffith v. Blunt*, 4 B. 248; *Rowland v. Tawney*, 26 B. 67; *Re Thatcher's Trust*, *ib.* 365; *Selby v. Whitaker*, 6 Ch. D. 239; see *Creeth v. Wilson*, 9 L. R. Ir. 216.

In many cases, however, "vested" has been used as equivalent to indefeasible or payable.

Thus, if the shares of members of a class are directed to be vested at a certain time, and there is a gift over to the other members of the class of the shares of those dying before that time without issue, vested will mean payable. *Taylor v. Frobisher*, 5 De G. & S. 191.

So, too, if legatees are treated as taking vested shares before the time fixed for vesting, vested must mean payable.

This will be the case, if a time is appointed for vesting, and maintenance is given, if any child entitled on the death of the tenant for life to a vested or presumptive share should be under the age appointed for vesting, where the word presumptive refers to the possibility of accruer. *Berkeley v. Swinburne*, 16 Sim. 275; *Baxter's Trust*, 4 N. R. 131; 10 Jur. N. S. 485.

Similarly, if in the event of any child dying before the time of vesting, leaving children, there is a gift of the share such child would have had if living to his issue, the direction as to

vesting will be referred to payment. *In re Edmondson's Estate*, 5 Eq. 389; *Poole v. Bott*, 11 Ha. 33.

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Or again, it may appear that the testator has used the terms vested and paid interchangeably. *In re Edmondson's Estate*, *supra*; *Williams v. Haythorne*, 6 Ch. 782; *Re Parr's Trust*, 41 L. J. Ch. 170.

Vested and  
paid used  
interchange-  
ably.

And when there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to vesting at twenty-one will be referred to indefeasible vesting or possession. *Barnet v. Barnet*, 29 B. 239; *Simpson v. Peach*, 16 Eq. 209.

Direction to  
pay legacies  
at a certain  
time.

When there is a gift to children who survive their parent, a direction as to vesting will not make the gift vest in any who do not survive their parent. *In re Payne*, 25 B. 556; *Williams v. Haythorne*, 6 Ch. 782; see *Draycott v. Wood*, 5 W. R. 158.

Gift to  
children who  
survive the  
parent with a  
direction as  
to vesting.

If, however, the proviso as to vesting is intended to introduce a new gift, evidenced by the fact, for instance, that it applies to prior legatees who die leaving issue, and not merely to such of them as survive the tenant for life, it will override the previous contingency of surviving the tenants for life. *Williams v. Russell*, 10 Jur. N. S. 168.

A direction that legatees are to be beneficially interested at a certain period, refers only to vesting in possession. *M'Lachlan v. Tuitt*, 28 B. 407; 2 D. F. & J. 449.

Beneficial  
interest.

## II. Where there is no direction as to vesting:

1. It is important to distinguish a gift to a contingent class, and a gift to a class upon a contingency; thus, a gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as, for instance, at twenty-one, might have the effect of vesting the bequest. *Bull v. Pritchard*, 1 Russ. 213; *Bree v. Perfect*, 1 Coll. 128; *Leake v. Robinson*, 2 Mer. 363; *Stead v. Platt*, 18 B. 50; *Lloyd v. Lloyd*, 3 K. & J. 20; *Thomas v. Wilberforce*, 31 B. 299; *Williams v. Haythorne*, 6 Ch. 782; *Dewar v. Brooke*, 14 Ch. D. 529; see *Re Bulley's Estate*, 11 Jur. N. S. 791, 847; *Gotch v. Foster*, 5 Eq. 311.

Gift to a class  
who attain 21,  
and to a class  
at 21.

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Contingency  
not imported  
into the gift  
to a single  
child.

Direction as  
to payment  
will not post-  
pone vesting  
when there is  
a clear gift

If the gift is to children who attain twenty-one, and, if but one child, to such child, the contingency of attaining twenty-one will not be imported into the gift to a single child. *Walker v. Mower*, 16 B. 365; *Johnson v. Foulds*, 5 Eq. 268.

2. When there is a clear gift, an additional direction to pay, when the legatee attains a given age, will not postpone the vesting, the gift being considered *debitum in presenti, solvendum in futuro*.

Thus, a gift to A., payable at twenty-one is vested, and it makes no difference whether the gift precedes or follows the direction for payment, provided a clear immediate gift can be found in the will. *In re Bartholomew*, 1 Mac. & G. 354; *Shrimpton v. Shrimpton*, 31 B. 425; *Maher v. Maher*, 1 L. R. Ir. 22.

Where the  
only gift is  
in the direc-  
tion to pay,  
nothing vests  
till then.

The difficulty in these cases is to decide whether there is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay. See *Shum v. Hobbs*, 3 Dr. 93; *Chaffers v. Abell*, 3 Jur. 577; *Williams v. Clark*, 4 De. G. & S. 472; *Merry v. Hill*, 8 Eq. 619.

Direction to  
accumulate  
interest till 21  
will not affect  
a gift already  
vested.

Of course, when there is a clear gift, a direction to accumulate the interest and to pay the principal and accumulations at twenty-one will not affect the vesting. *Stretch v. Watkins*, 1 Mad. 253; *Blease v. Burgh*, 2 B. 226; *Breedon v. Tugman*, 3 M. & K. 289.

In doubtful  
cases the  
contingency  
may be re-  
flected back  
and *vice versa*.

In doubtful cases the construction may be assisted by reference to other limitations; thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining twenty-five, and if but one child, the whole to become the property of such only child, upon his attaining twenty-five, and be transmissible to his heirs, executors, or administrators, none of the children took vested interests before twenty-five, the gift, in the event of there being an only child, being clearly contingent. *Judd v. Judd*, 3 Sim. 525; see *Hunter v. Judd*, 4 Sim. 455; *Merry v. Hill*, 8 Eq. 619.

Similarly, if the interest of an only child is clearly vested, this may show that a gift to all the children at twenty-one was meant to be vested too. *King v. Isaacson*, 1 Sm. & G. 371.

And it may appear from the context that the words "to be paid" were meant to refer to vesting and not to payment. *Martineau v. Rogers*, 8 D. M. & G. 328.

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Paid may  
mean vested.

3. The time when the legacy is to be paid must, however, be certain; that is to say, it must be certain that the time will come if the legatee lives long enough. No doubt it is uncertain whether a legatee will ever attain a given age, but since he must attain it if he lives, this latter contingency is disregarded.

Gift to be  
paid at a time  
which may  
never come in  
the legatee's  
life is con-  
tingent.

"When the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this Court where it has been held that the legacy at all events should be paid." It becomes, in fact, a legacy upon condition, for *dies incertus conditionem in testamento facit*. Thus, a legacy to A. to be paid upon marriage is contingent. *Atkins v. Hiccocks*, 1 Atk. 500; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Morgan v. Morgan*, 4 De G. & Sm. 164; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Corr v. Corr*, 1 R. 7 Eq. 397; *Malcolm v. O'Callaghan*, 2 Mad. 349; *Taylor v. Lambert*, 2 Ch. D. 177.

But if interest is given in the meantime, the legacy will be vested, though given upon marriage. *Booth v. Booth*, 4 Ves. 399; *Vize v. Stoney*, 1 D. & War. 337.

But a gift of  
interest in the  
meantime  
makes it  
vested.

It may be noticed, however, that a legacy given upon marriage may be held upon the context to be given at twenty-one, or upon marriage under twenty-one, as where there was a gift to parents for life, and then to their children if then of age or married, and if any were infants at the death of their parents, then to them at twenty-one, if sons, or on marriage if daughters. *Lang v. Pugh*, 1 Y. & C. C. 719; see *West v. West*, 4 Giff. 198.

Gift upon  
marriage con-  
strued as a  
gift at 21, or  
upon marriage  
under 21.

4. When the only gift is to be found in the direction to pay or divide:

a. If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. *Bennett's Trust*, 3 K. & J. 280; *Strother v. Dutton*, 1 De G. & J. 675.

Direction to  
pay after a  
life interest  
vests at once.

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Direction to  
pay at 21 will  
not vest till  
then.

b. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time.

Thus, a gift to a person at, or if, or as and when he shall attain, or upon attaining, or from and after attaining twenty-one, will not vest till the age is attained. *Hanson v. Graham*, 6 Ves. 239; *Locke v. Lamb*, 4 Eq. 372.

5. There are, however, several circumstances which may have the effect of vesting a gift contingent upon attaining a given age:

Contingent  
gift becomes  
vested by  
severance.

a. If the subject of the gift is to be at once separated from the rest of the estate, and vested in trustees to be for the benefit of the legatee, though the interest may not be given in the meantime, but directed to accumulate and go with the capital. *Love v. L'Estrange*, 5 B. P. C. 59; *Saunders v. Vautier*, Cr. & Ph. 240; *Greet v. Greet*, 5 B. 123; *Branstrom v. Wilkinson*, 7 Ves. 420; *Lister v. Bradley*, 1 Ha. 10; *Ingram v. Suckling*, 7 W. R. 386.

By gift of the  
intermediate  
interest.

b. If the interest upon the legacy, or upon the legatee's presumptive share, is given to the legatee in the meantime till the time of payment arrives. *Hanson v. Graham*, 6 Ves. 239; *Hart's Trusts*, 3 De G. & J. 195; *Hardcastle v. Hardcastle*, 1 H. & M. 405; *Bell v. Cade*, 2 J. & H. 122; *Bolding v. Strugnell*, 24 W. R. 339; 45 L. J. Ch. 208.

This rule applies in the case of deeds. *Mostyn v. Brunton*, 17 Ir. Ch. 153.

(i.) The rule applies though the interest may be given subject to charges or annuities. *Lane v. Goudge*, 9 Ves. 225; *Jones v. Mackilwain*, 1 Russ. 220; *Potts v. Atherton*, 28 L. J. Ch. 486.

(ii.) Though the interest may be expressed to be given for maintenance. *Hart's Trusts*, 3 De G. & J. 195; *In re Bunn*; *Isaacson v. Webster*, 16 Ch. D. 47.

(iii.) It makes no difference, whether the interest is first given up to a given time and then the principal, or *vice versa*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier. *Wadley v. North*, 3 Ves. 364; *Westwood v. Southey*, 2 Sim. N. S. 192; *Bird v. Maybury*,

33 B. 351; *Pearman v. Pearman*, 33 B. 394; *Pearson v. Dolman*, 3 Eq. 315.

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It seems doubtful whether *Spencer v. Wilson*, 16 Eq. 501, is in harmony with the general current of authority, or even with the views expressed in *In re Peek's Trusts*, *ib.* 221, 225.

On the other hand, if the interest is given up to a very advanced age, and the principal not till then, it is more doubtful whether the bequest would be vested. *Batsford v. Kebbel*, 3 Ves. 363; see *In re Bunn*; *Isaacson v. Webster*, 16 Ch. D. 47; *Scotney v. Lomer*, 29 Ch. D. 535.

c. It seems not to be quite clearly settled whether, where there is a discretion to trustees to apply the whole or part of the interest to the maintenance of the legatees, the bequest will be vested. The better opinion now seems to be that it will. *Eccles v. Birkett*, 4 De G. & S. 105; *Rouse's Estate*, 9 Ha. 649; *Fox v. Fox*, 19 Eq. 286; *Parrott v. Davies*, 38 L. T. N. S. 52; see, however, *Pulsford v. Hunter*, 3 Bro. C. C. 416; *Ashmore's Trusts*, 9 Eq. 99; *In re Grimshaw's Trusts*, 11 Ch. D. 406; *Wilson v. Know*, 13 L. R. Ir. 349.

Effect of  
discretion to  
apply the  
whole or part  
of the  
interest.

It has been suggested, that where the accumulated surplus would go to the same legatees as the interest and capital, the legacy is vested; but where the surplus income is either expressly given over, or would not follow the capital, it is not; so that a gift of residue in such a case would be vested, whereas a particular legacy would not. See *Pearson v. Dolman*, 3 Eq. 315. But *quære* whether this distinction reconciles the cases.

But a discretion either to apply the interest to maintenance or to accumulate it will not vest the legacies: *Vaudry v. Geddes*, 1 R. & M. 203; nor, perhaps, will a discretion to apply the whole or part of the interest, not exceeding a fixed sum, to maintenance: *Merry v. Hill*, 8 Eq. 619; nor will the gift of a fixed sum for maintenance, though it may be equivalent to the interest of the legacy: *Boughton v. Boughton*, 1 H. L. 406; *Watson v. Hayes*, 5 M. & Cr. 125; *Livesey v. Livesey*, 3 Russ. 287.

Cases in which  
a gift of  
interest is not  
sufficient to  
vest con-  
tingent  
legacies.

And the gift of a sum for maintenance out of the personal estate not exceeding the income of the legacies will have no effect upon vesting. *Wynch v. Wynch*, 1 Cox, 433; *Rudge v. Winnall*, 12 B. 357.

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A discretionary power given to trustees to apply the income for the benefit of the legatees, to the exclusion of any one or more of them, will not vest their shares. *In re Barnshaw's Trust*, 15 W. R. 378.

Effect of a gift of interest for a portion of the period before vesting.

d. Where interest is given only for a portion of the period before the time fixed for payment, if, for instance, legacies are given at twenty-six, with interest for maintenance during minority, it is doubtful whether the gift will be vested; probably it will not without more. See the remarks in *Pearson v. Dolman*, 3 Eq. 315. In *Davies v. Fisher*, 5 B. 201; *Harrison v. Grimwood*, 12 B. 192; *Tatham v. Vernon*, 29 B. 604, there were other circumstances. And see *Hunter's Trusts*, L. R. 1 Eq. 295.

It may be noticed, that minority properly means the period before the attainment of twenty-one; though, if there is an intention expressed to that effect, it may mean the whole period during which the testator has kept the legatee out of the property. *Milroy v. Milroy*, 14 Sim. 48; *Maddison v. Chapman*, 4 K. & J. 709; 3 De G. & J. 536; *Fraser v. Fraser*, 1 N. R. 430.

Gift of interest itself contingent.

e. Of course, where the interest is not given in the meantime, but is itself given at the same time as the principal, the gift does not vest. *Knight v. Knight*, 2 S. & St. 490; *Locke v. Lamb*, 4 Eq. 372.

Distinction between gift of interest upon a legacy to an individual and upon an aggregate fund given to a class.

f. A distinction must be drawn between the gift of a sum to each member of a class at twenty-one, with a gift of the interest upon the several shares in the meantime, and the gift of an aggregate fund to a class as they respectively attain twenty-one, with a direction that the whole interest is to be applied for their maintenance in the meantime; in the latter case, as the fund is to be kept together, and the whole interest applied for maintenance, nothing will vest before twenty-one. *Pulsford v. Hunter*, 3 B. C. C. 416; *Barker v. Lea*, T. & R. 413; *In re Ashmore's Trusts*, 9 Eq. 99; *In re Parker*; *Barker v. Barker*, 16 Ch. D. 44; *In re Morris*; *Salter v. A.-G.*, 33 W. R. 895. Perhaps *In re Grimshaw's Trusts*, 11 Ch. D. 406, may be supported on this ground.

Whether gift of personalty to A. till B.

g. It seems a gift of personalty to A. till B. attains twenty-one, and then to B., will not give B. a vested interest. *Sullivan*

v. *Edgell*, 23 W. R. 722; though it will where there is anything to show that A. takes in trust for B. on the principle already stated, *ante*, p. 377. *Lane v. Goudge*, 9 Ves. 225.

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attains 21, and  
then to B., is  
vested.  
Arguments in  
favour of  
vesting.

h. An argument in favour of vesting has sometimes been based upon a power to make advances. *Vivian v. Mills*, 1 B. 315; *Harrison v. Grimwood*, 12 B. 192; *Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson*, 1 K. & J. 713; see *Malden v. Maine*, 2 Jur. N. S. 206.

And the fact that the gift is residuary is also, it is said, in favour of vesting. *Booth v. Booth*, 4 Ves. 399; see *ante*, p. 387.

#### 6. Effect of a gift over upon vesting :

a. It seems a mere gift over upon death under twenty-one will not have the effect of vesting a prior gift contingent upon attaining twenty-one, though the point is doubtful. *Ridgway v. Ridgway*, 4 De G. & S. 271; *Davies v. Fisher*, 5 B. 201; in both which cases there were other circumstances which alone would have been sufficient to vest the gift; and see *per* Sir J. Leach in *Bland v. Williams*, 3 M. & K. 411. The remarks, however, of Sir John Leach seem to be based on the theory that a gift over under twenty-one, the prior gift being at twenty-one, shows that the prior gift was not meant to be vested. The truer doctrine appears to be, that a gift over upon death under twenty-one neither shows that the prior gift was meant to be contingent, nor has the effect of making it vested. See *Re Baxter's Trusts*, 4 N. R. 131; *Malcolm v. O'Callaghan*, 2 Mad. 349; *In re Payne*, 25 B. 556.

A mere gift  
over upon  
death before  
the time of  
vesting has  
no effect.

b. But where the gift is to a class at twenty-one, followed by a clause of accruer giving the interests of those dying under twenty-one to the other members of the class (a direction which would be useless if the shares are contingent till twenty-one), there is a strong argument in favour of vesting. *In Edmondson's Estate*, 5 Eq. 389; see *In re Gunning's Estate*, 13 L. R. Ir. 203.

A clause of  
accruer is an  
argument for  
vesting.

c. It seems that a mere gift over upon the death of any of the legatees without issue will not vest contingent legacies. *Barker v. Lea*, T. & R. 413.

Gift over  
upon death  
without issue.

d. But a gift over upon death under twenty-one, and without issue, will vest a prior gift at twenty-one.

Gift over upon  
death without  
issue before

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the time of  
vesting.

The testator seems to imply that the legacy is to go over not upon failure to attain that age, but only in the events mentioned, and the attainment of the given age is therefore not a condition precedent to vesting. *Harrison v. Grimwood*, 12 B. 192; *Bland v. Williams*, 3 M. & K. 411; *Murkin v. Phillipson*, *ib.* 257; *Thomson's Trusts*, 11 Eq. 146.

Effect of gift  
over upon  
death of the  
parent without  
issue upon  
contingent  
bequests to  
the children.

*e.* But if the gift is to A. for life, then to her children at twenty-one, and if A. dies without issue, or without leaving issue over, the gift over has no effect upon the vesting, since it may have been intended to provide for the death of all the children before the tenant for life. *Walker v. Mower*, 16 B. 365; *Wrangham's Trusts*, 1 Dr. & Sm. 358; *Kidman v. Kidman*, 40 L. J. Ch. 359; see *Wetherall v. Wetherall*, 1 D. J. & S. 134.

On the other hand, if the gift is to children living at the death of the tenant for life, as they attain twenty-one, a gift over on the death of the tenant for life without leaving issue will afford a strong argument in favour of vesting, since it is ineffectual if the children survive the parent and die under twenty-one. *Bree v. Perfect*, 1 Coll. 128.

Gift to a class  
when the  
youngest  
attains 21.

7. When the gift is to a class when the youngest attains twenty-one, it is clear that all who attain twenty-one will take vested interests. *Leeming v. Sherratt*, 2 Ha. 14; *Parker v. Sowerby*, 1 Dr. 488; see 4 D. M. & G. 321; *Smith's Will*, 20 B. 197; see *Sansbury v. Read*, 12 Ves. 75; *Ford v. Rawlins*, 1 S. & St. 329; *In re Hunter's Trust*, L. R. 1 Eq. 295.

Whether those  
dying under  
21 are ex-  
cluded.

It has, however, been said, that those who die under twenty-one will not take vested interests: see the cases *supra cit.*; but in them the exact point does not appear to have arisen for decision, and to import the contingency of attaining twenty-one into the constitution of the class seems contrary to principle. See *Coldecott v. Best*, W. N. 1881, 150.

At any rate, in such a case, if the gift is not to a class, but to individuals named, they take vested interests. *Cooper v. Cooper*, 29 B. 229; see *Re Lyman's Trust*, 2 L. T. N. S. 662.

So, too, if the income is given to the class till the youngest attains twenty-one, and then the principal, they all take vested interests. *Grove's Trusts*, 3 Giff. 575; *Re Andrew*, 8 L. J. Notes of Cases 174; see *Boulton v. Pilcher*, 29 B. 633.

And if there is a clear gift to the class, a direction that it is to be divided when the youngest attains twenty-one will not postpone the vesting. *Knox v. Wells*, 2 H. & M. 674; see *Hilliard v. Fulford*, 28 L. T. N. S. 892; 42 L. J. Ch. 624; *Blasson v. Blasson*, 2 D. J. & S. 665.

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III. Gifts to children contingent upon surviving their parents.

1. In many cases where a gift to children has been made contingent upon their surviving their parents, the Courts have laid hold of slight ambiguities to give them vested interests at birth. Most of the cases upon this subject have arisen on marriage settlements where there is a strong presumption of intention to provide for children generally, whereas gifts by will are mere bounty. *Farrer v. Barker*, 9 Ha. 743; but see *Jackson v. Dover*, 2 H. & M. 209.

It is, however, now clearly settled that in marriage settlements, as in wills, words of contingency must have their full force, and the Court will "lean" in favour of vesting only in cases of doubtful construction. *Whatford v. Moore*, 3 M. & Cr. 289; *Jeyes v. Savage*, 10 Ch. 555.

Words of contingency must have their full force in settlements as in wills.

Thus a gift, after life interests to parents, to the children living at their decease, or if there are any children then living to such children, only goes to those who survive their parents; *a fortiori* if provision is made for the issue of children who die before their parents leaving issue. *Jeyes v. Savage*, *supra*; *In re Deighton's Settled Estates*, 2 Ch. D. 783.

Gifts to children living at their parents' death.

The fact that the word "such" is sometimes omitted in some of the limitations will not cause its rejection, if it occurs in the limitation under which the children take. *Whatford v. Moore*, 3 M. & C. 270; *Skipper v. King*, 12 B. 29; *Wilson v. Mount*, 19 B. 292.

Force of the word "such."

But, it would seem, it may be rejected, if it appears on the whole will that it is incorrectly used. *Howgrave v. Cartier*, 3 V. & B. 79; see *Rye v. Rye*, 1 L. R. Ir. 413.

It may be rejected if inaccurately or inconsistently used.

And if the parent has power to pay over their shares to such children in his lifetime, the contingency of surviving the parent will be rejected, since the testator cannot have meant shares paid to children who die before their parents to be returned.

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*Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson*, 1 K. & J. 713.

Where the interest was given for the maintenance of such children as should be living at the parents' decease until they should attain twenty-one, followed by a gift to the children when they attained twenty-one, it was held that children who attained twenty-one took vested interests, though they predeceased their parents. *Bradley v. Barlow*, 5 Ha. 589.

Gift contingent upon surviving a parent explained by context.

2. And there may be sufficient evidence of intention to show that children dying before their parents were to take vested interests, though the original gift is contingent upon their surviving them.

Thus, if there is a direction that children are to take vested interests at twenty-one, or upon marriage, "though such respective times may happen before the parents' decease," the prior gift is controlled. *Dalton v. Hill*, 10 W. R. 396.

The same is the case, if the shares of the children are expressly referred to by the testator as payable in their parents' lifetime, and directed not to be paid till their deaths. *Jackson v. Dover*, 2 H. & M. 209.

But the mere fact, that the interests are to be vested at twenty-one, but not to be transferred till after the parents' death, will not give children dying before their parents vested interests, the word vested being read as equivalent to payable. *Williams v. Haythorne*, 6 Ch. 782.

But if the direction is that children, who attain twenty-one, or die under that age leaving issue, are to take vested interests, the direction will control the contingency, and children who attain twenty-one and die before their parents will take vested interests. *Williams v. Russell*, 10 Jur. N. S. 168.

Gift to children who survive their parents may be vested by the effect of the gift over.

3. So, too, children will take vested interests before their parents' death, if the property is given over in events which do not include the death of some of the children over twenty-one in their parents' lifetime, so that in that event the property would be undisposed of. *Perfect v. Lord Curzon*, 5 Mad. 442; *Torres v. Franco*, 1 R. & M. 649; *Swallow v. Binns*, 1 K. & J. 417; *Dixon v. Barkshire*, 34 B. 537; *In re Knowles*; *Nottage v. Buxton*, 21 Ch. D. 806.

4. In cases, where there is a gift to a class of children, if any children survive their parents, it is clear, that unless some children survive the parents the gift never arises. *Hotchkin v. Humfrey*, 1 Mad. 65; *Fitzgerald v. Field*, 1 Russ. 430.

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Gift to a class upon a contingency.

But the contingency will not, without express words, be imported into the constitution of the class, so that if the contingency happens all members of the class will take whether they survive the contingency or not; thus, if there is a gift to A. for life, and then if he die leaving a child, to his children as tenants in common, and one child survives A., all his children, whether they survive him or not, will take. *Boulton v. Beard*, 3 D. M. & G. 608; *M'Lachlan v. Taitt*, 28 B. 407; 2 D. F. & J. 449; *Re Gratwicke*, 35 B. 315; *Re Orlebar's Settlement*, 20 Eq. 711; *Goddard's Trusts*, 1 R. 5 Eq. 14; see *Blasson v. Blasson*, 2 D. J. & S. 665; *Taylor v. Graham*, 3 App. C. 1287.

The contingency is not to be imported into the constitution of the class.

Similarly, powers of raising different sums according to the number of children a man may have, will not be limited to mean the number of children capable of taking. *Knapp v. Knapp*, 12 Eq. 238; *In re Verschoyle's Trusts*, 3 L. R. Ir. 43; see *Rye v. Rye*, 1 L. R. Ir. 413.

But if the gift is to the children of A. if he leaves any him surviving, and there is a gift over if A. leaves no children him surviving, it would seem only children surviving A. would take. *Winn v. Fenwick*, 11 B. 438; *Wilson v. Mount*, 2 W. R. 448; 19 B. 292; *Stevens v. Pile*, 30 B. 284; *Stolworthy v. Sancroft*, 12 W. R. 635.

Effect of gift over if no one of the class survive the contingency.

Of course, if the gift is in the event of there being any children surviving at a particular time to "such" children, only those who survive the contingency can take, but the Court will not supply the word "such" if it does not occur in the limitation under which the children take, so as to cut down the class, though the omission may be accidental. *Woodcock v. Duke of Dorset*, 3 B. C. C. 569, corrected in 3 V. & B. 83; *King v. Hake*, 9 Ves. 439; *Stolworthy v. Sancroft*, 12 W. R. 635.

The word "such" will not be supplied so as to make a gift contingent.

If there is a gift in remainder or upon a contingency to a class, which would give the members of the class vested interests immediately, or upon the happening of the contingency, and there is a direction that if there be but one child

Contingency reflected back.

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living at the period of distribution, or when the contingency happens, the whole is to go to that child, the contingency of being then living, has in several cases been reflected back into the constitution of the original class. *Smith v. Vaughan*, 8 Vin. Ab. 381, tit. Devise (Z. c.), pl. 32; *Spencer v. Bullock*, 2 Ves. jun. 687; *Madden v. Ikin*, 2 Dr. & S. 207; *Lewis v. Templer*, 33 B. 625; *Cooper v. Macdonald*, 16 Eq. 258.

The point cannot, however, be said to be settled beyond dispute in the face of *Kimberley v. Tew*, 4 D. & War. 139.

To what the  
word "then"  
refers.

5. When there is a gift after prior interests to persons "then living," the word then refers most naturally to the last antecedent; thus, in the case of a gift to A. for life, remainder to B. for life, remainder to a class "then living," the word then refers to B.'s death, whether he dies before A. or not. *Archer v. Jegon*, 8 Sim. 446; *Wollaston's Settlement*, 27 B. 642; *Powis v. Matthews*, 11 W. R. 662; *Olney v. Bates*, 3 Dr. 319; *Heasman v. Pearse*, 7 Ch. 661.

On the other hand, if the object of the testator is not to limit successive interests, but to provide for personal enjoyment by the legatees by substituting for persons dying before the period of enjoyment a class of persons then living, the word then refers most naturally to the period of enjoyment. *Harvey v. Harvey*, 3 Jur. 949; *Hetherington v. Oakman*, 2 Y. & C. C. 299; *Gill v. Barrett*, 29 B. 373; see, too, *Heasman v. Pearse*, 7 Ch. 275.

It may be noticed that in a gift to several persons nominatim and their children then living, the contingency of being then living will not be applied to the parents as well as the children, unless there is something to show that parents and children were to form one homogeneous class. *Burrell v. Baskerfield*, 11 B. 255; *Cormack v. Copous*, 17 B. 397; *Turner v. Hudson*, 10 B. 222.

Construction  
of the words  
"then living."

For cases in which the words "then living" may be construed as referring to the *stirpes*, see *Cooper v. Macdonald*, 16 Eq. 258; and see *Survivors*.

#### IV. Vesting of interests under powers of appointment.

From what  
time persons  
taking under

Where there is a gift to certain persons as A. shall appoint, or a power to appoint certain property, and a gift in default of

appointment, the persons to take in default of appointment take vested interests at the testator's death, subject to be divested by the exercise of the power. *Doe d. Willis v. Martin*, 4 T. R. 39; *Fearne*, C. R. 225.

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a power take  
vested  
interests.

Thus a gift to children as A. shall by will appoint vests in all the children, but an appointment of the whole in favour of an only surviving child is good. *Woodcock v. Renneck*, 4 B. 190; 1 Ph. 72.

If, however, the power is exercised in favour of the same persons as would have taken in default of appointment, a question arises, whether the appointees are to be considered as taking under the original will or under the power.

It seems clear, that where the will authorises an appointment among persons, who would not all take in default of appointment, the appointees take under the exercise of the power. *Lee v. Olding*, 25 L. J. Ch. 580; 2 Jur. N. S. 850; *Vizard's Trusts*, L. R. 1 Ch. 588; *Sweetapple v. Horlock*, 48 L. J. Ch. 660.

Even if the power is merely distributive, so that the persons to take under the appointment and in default are the same, they take, nevertheless, under the exercise of the power, and not under the instrument creating it. *De Serre v. Clarke*, 18 Eq. 587.

Where a person on his marriage covenants to settle a share to which he is entitled in default of appointment, and the donee of the power subsequently appoints to him, the covenant is not void under section 91 of the Bankruptcy Act, 1869, as relating to property in which the bankrupt had no interest at the date of his bankruptcy. *Re Andrews' Trusts*, 7 Ch. D. 634.

## CHAPTER XXXIV.

## PERPETUITY AND ACCUMULATION.

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Direction to  
brick up  
house.

A TESTATOR cannot direct his property not to be used at all for a certain time; for instance, he cannot direct his house to be bricked up for twenty years. In such a case there is an intestacy during the twenty years. *Brown v. Burdett*, 21 Ch. D. 667.

Rule against  
remoteness  
stated.

A limitation by way of executory devise is void as too remote, if it is not to take effect until after the determination of one or more lives in being and upon the expiration of twenty-one years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation, or of any other person, allowance for gestation being made only in those cases where it actually exists. *Cadell v. Palmer*, 1 Cl. & F. 372.

The fact that the executory interest is given to an ascertained person so that he and the present owner of the estate can together make a good title within the limits of perpetuity does not make the executory interest valid if the event upon which it is to take effect is too remote.

Thus a covenant in a conveyance of land to reconvey on certain events not limited in time, or an unlimited right of re-entry, are void for remoteness. *London and South Western Railway v. Gomm*, 20 Ch. D. 562; *Dunn v. Flood*, 25 Ch. D. 628; overruling *Birmingham Canal Company v. Cartwright*, 11 Ch. D. 421. See *In re Adams*, 24 Ch. D. 199; 27 Ch. D. 394.

Gift over of  
property given  
to charity is  
good however  
remote.

The object of the rule is to limit the inalienability of property, it does not therefore apply, where money given to charity is given over upon a remote event, the effect of the gift over being

to make inalienable property alienable. *Christ's Hospital v. Grainger*, 16 Sim. 83; 1 Mac. & G. 460.

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A gift by a foreign will of leaseholds in England is governed by the rules of English law relating to perpetuity and accumulation. *Freke v. Lord Carbery*, 16 Eq. 461.

A direction to lay out money in the purchase of land in Scotland, to be settled to uses which are good according to Scotch law, but would be void for remoteness in England, is valid. *Fordyce v. Bridges*, 2 Ph. 497, 515.

Direction to buy land in foreign country to be settled on remote uses.

It has been much debated, whether the rule against perpetuity applies to legal remainders, but it appears to be now settled that it does not. See *Cole v. Sewell*, 4 D. & War. 1; 2 H. L. 186.

The rule does not apply to legal remainders.

On the other hand, though remainders are not subject to the doctrine of perpetuity, they are controlled by an analogous doctrine, that no estate by way of remainder can be limited to the unborn son of an unborn person, whether expressly limited to take effect within the limits of perpetuity or not; so that, for instance, in a limitation to A. an unmarried person for life, remainder to his first son for life, remainder to the first son of the first son of A., born in A.'s life, or within twenty-one years afterwards, in fee, the ultimate remainder in fee would be bad, though clearly within the limits of perpetuity. 2 Rep. 51a.; 10 Rep. 50 b.; *Monypenny v. Dering*, 2 D. M. & G. 145.

Legal remainder to unborn son of unborn person void.

The practical result of this rule is, that legal remainders are, in fact, confined within narrower limits as regards perpetuity than other limitations, since there seems no reason to doubt, that the limitation above-mentioned would be good in the case of executory limitations.

There seems to have been no decision upon the precise point, whether legal remainders can be too remote, though *Cole v. Sewell*, *supra*, has been supposed to be such a decision.

Whether *Cole v. Sewell* is a direct decision on the question whether a legal remainder can be too remote.

In that case, after limitations in tail in favour of particular lines of issue, there was a gift over upon a general failure of issue, and it was held that the gift over was good, being a legal remainder, and therefore barrable as long as it subsisted. The decision, it is said, must have proceeded on the exact ground, that the remainder was not void for perpetuity because it was a

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legal remainder, since the rule is that a limitation other than a legal remainder, if limited upon an event too remote, is bad, even though the previous estates may be in tail, unless the event must take place before the determination of the prior estates, or in other words, unless the limitation over is always barrable; and in *Cole v. Sewell* there might have been a failure of the particular lines of issue before a failure of issue generally, so that if the remainder had been equitable it would have been bad.

But, it may very well be said, that the decision in *Cole v. Sewell*, in the House of Lords, was that the remainder was good, not because it was a legal remainder, but because, being a legal remainder, it was always barrable as long as it subsisted.

The doctrine of perpetuity was excluded not because the remainder was legal but because it was barrable.

It does not follow that it would have been good if the prior estates had not been estates tail.

The fact that legal contingent remainders after an estate tail must be barrable as long as they are contingent, since they fail by the failure of the prior estate, is in itself no argument for saying that they are good because they are remainders, and not because they are always barrable.

Opinion of  
Ferne.

On the other hand, it seems that Ferne considered that the doctrine of perpetuity was applicable to remainders. "Any limitation in future," he remarks, "or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation." See *Cont. Rem.* 501 (ed. 10th, 1844).

It is true he goes on to quote as an instance a limitation of lands in succession first to a person *in esse*, and after his decease to his unborn children, and afterwards to the children of such unborn children, which is admitted to be void by those who deny that the doctrine of perpetuity applies to remainders; but he seems to have meant that such a limitation would be void for perpetuity and not as a possibility upon a possibility,

so that if limited to take effect within the bounds of perpetuity it would be valid.

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Lord Hatherley, too, in *Cattlin v. Brown*, 11 Ha. 377, lays down the same principle; and the opinion expressed in Mr. Jarman's treatise is to the same effect. See 4th ed., vol. i., p. 258.

Of Lord  
Hatherley and  
Jarman.

On the other hand, the authority for the second branch of the rule, namely, that a limitation by way of remainder to the unborn son of an unborn person, is bad in itself, independently of remoteness, is entirely unsupported by decision, and is in fact a survival of the old doctrine, that there cannot be a possibility upon a possibility, which, if it ever existed (see *Duke of Norfolk's Case*, 3 Ch. C. 1, Lord Northington's judgment), has long since been exploded for all other purposes; and the numerous dicta, which lay down that a devise by way of a remainder to the unborn son of an unborn person is void, might very well be understood as laying down no more, than that such a limitation is void because it is too remote, and not because it is to the unborn son of an unborn son.

Authority for  
the second  
branch of the  
rule.

As Lord St. Leonards points out, "A limitation like this is clearly void by reason of its tendency to a perpetuity, independently of the technical objection of its being a possibility upon a possibility, which probably means the same thing." Powers, p. 393. If it does mean the same thing, a devise by way of remainder to the son of an unborn son if born within the life of his grandfather, or within twenty-one years afterwards, being within the limits of perpetuity, would be good.

Mr. Joshua Williams argues against the validity of such limitations, because no conveyancer has ever embodied them in a settlement. But the mere fact that their validity is doubtful, would be sufficient to deter a careful conveyancer, much more the Court of Chancery, from adopting them in a settlement. To insert them would, in fact, be to bring about the decision of a speculative point of law at the expense of a client, which is what a conveyancer exists to prevent. Again, there seems no reason to suppose, that such limitations are invalid with regard to personalty, to which the doctrine of a possibility upon a possibility never had any application, nor does Mr. Williams

Argument of  
Mr. Joshua  
Williams.

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extend it to personalty. (See Personal Property, p. 268.) Yet such a settlement appears to be no more common in the case of personalty than of realty. And, indeed, it is doubtful whether settlors or testators desiring to tie up their property, would prefer the limitations here discussed to those ordinarily introduced into settlements, since their effect would be, not to tie up property one day longer than can be done by other means, but to favour more remote at the expense of less remote descendants.

**Arguments in  
favour of  
extending the  
rule against  
remoteness to  
legal re-  
mainders.**

If, then, amid this conflict of authority, it were possible to consider the question as one of first impression, the main arguments in favour of extending the rule against perpetuities to remainders, would seem to be, in the first place, the advantage of one uniform rule as applicable to every form of limitation, and in the second place, that it would no longer be necessary to put in force the old doctrine against a possibility upon a possibility, which is at the best of doubtful validity.

**Arguments of  
Mr. Tudor.**

It is not unusual to find other arguments brought forward in favour of extending the rule of perpetuity to remainders, but it may be doubted whether they are entitled to great weight.

Lord St. Leonards, in *Cole v. Sewell*, 4 Dr. & War. 1, says, "It is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question, for the given remainder is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then by the rule of law, unless the event upon which the contingency depends happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all," p. 28.

To this Mr. Tudor replies, that this reasoning does not apply when the estates are equitable, or when there are trustees to preserve contingent remainders. Tudor, *Leading Cases*, 2nd ed., 409; 3rd ed., 473.

Equitable estates, however, are not, properly speaking, remainders at all, but in the nature of executory interests, and as such subject to the ordinary rule against perpetuity.

And, on the other hand, it would be difficult to frame a limitation to trustees to preserve contingent remainders, followed by a limitation which should be at once a good legal remainder, and obnoxious on account of remoteness. The trustees could not take a fee, nor could they take a determinable fee, for no remainder could then be limited. *Seymour's Case*, 10 Co. 95 b.; Tudor, Leading Cases, 706. They must, therefore, either take in tail or for life. No doubt, in the former case, property might frequently be tied up for a very considerable time, since the trustees would have no motive for barring their estate tail; but even if they did not, the remainder might still fail by failure of issue of the trustees at any time before the remainder could take effect. See *Dawkins v. Lord Penrhyn*, 4 App. C. 51, 60.

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Of course, if the trustees take for life only, since the legal remainder must take effect within lives in being or not at all, there could be no objection on the score of remoteness.

An equitable contingent remainder, which may not take effect within the limits of perpetuity, will not become valid if the contingency happens during the subsistence of the particular estate. For instance, a devise to trustees on trust for A. for life and then for the first son of B. who attains twenty-five is void, though a son of B. attains twenty-five in A.'s lifetime. *In re Finch*; *Abbiss v. Burney*, 28 W. R. 903; 29 W. R. 449.

Equitable  
remainder.

In applying the rule against perpetuities, the state of things existing at the testator's death, and not at the date of the will, is to be looked at. *Vanderplank v. King*, 3 Ha. 17; *Cattlin v. Brown*, 11 Ha. 382; *Peard v. Kekewich*, 15 B. 173.

The rule is  
to be applied  
to the state of  
things existing  
at the testa-  
tor's death.

But possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good, because, as a matter of fact, it did so vest. *Lord Dungannon v. Smith*, 12 Cl. & F. 546; see *In re Roberts*; *Repington v. Roberts*, 50 L. J. Ch. 265.

Possible not  
actual events  
are to be con-  
sidered.

The fact that a woman is past the age of child-bearing at the date of the will or death, is not to be considered, and the chance of such a woman having children is a possible event for the purposes of determining whether a gift is void for perpetuity

That a woman  
past child-  
bearing may  
have children  
is a possible  
event within  
the rule.

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or not. *Jee v. Audley*, 1 Cox, 324; *In re Sayer's Trusts*, 6 Eq. 319; see *Cooper v. Laroche*, 43 L. T. N. S. 794; 29 W. R. 438.

Gift tending to tie up property for an indefinite time is void.

Any gift not being charitable, the object of which is to tie up property for an indefinite time, is void; as, for instance, a devise of land to the trustees of the Penzance Library, to hold to them and their successors for ever, for the maintenance and support of the library. *Carne v. Long*, 2 D. F. & J. 75; *Thompson v. Shakespear*, 1 D. F. & J. 399; *Neo v. Neo*, L. R. 6 P. C. 381; *In re Clark's Trust*, 1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54; *In re Sheraton's Trusts*, W. N. 1884, 174.

So, too, a restriction upon alienation beyond lives in being and twenty-one years after, is bad. *Armitage v. Coates*, 35 B. 1; *In re Teague's Settlement*, 10 Eq. 564; *In re Cunningham's Settlement*, 11 Eq. 324; *In re Michael's Trusts*, 46 L. J. Ch. 651.

Restraint upon anticipation.

It has been suggested that a restraint upon anticipation in the case of a married woman ought to be treated as an exception to the rule against perpetuity, as the object of the restraint is to preserve for the married woman the beneficial enjoyment of her property. *In re Ridley*; *Buckton v. Hay*, 11 Ch. D. 645.

Direction to lease for ever at low rent.

A direction that lands devised by the testator shall be leased for ever at an undervalue to his wife's kindred is void. *A.-G. v. Greenhill*, 33 B. 193; see, too, *Hope v. Corporation of Gloucester*, J. D. M. & G. 647; *Pollock v. Booth*, 1 R. 9 Eq. 229, 607.

Direction not to raise rents.

So, too, a direction not to raise the rent of lands devised is invalid. *A.-G. v. Catherine Hall*, Jac. 381.

Devise upon remote event.

It is clear that a devise of property to a named person to take effect upon a remote event is void. See *Bankes v. Holme*, 1 Russ. 394 n.; *Lewis v. Templer*, 33 B. 625; *Commissioners of Donations v. De Clifford*, 1 Dr. & War. 245, 254.

Where a lease for fifty-four years was bequeathed for life with remainders, followed by a direction upon the expiration of the lease to convey freeholds of the testator upon the same trusts, it was held that the direction was not void for perpetuity. *Wood v. Drew*, 33 B. 610.

Whether

No questions with regard to remoteness can arise on limita-

tions subsequent to an estate tail, provided the subsequent limitations must take effect, either during the existence of the estate tail or at the moment of its determination. *Cole v. Sewell*, 4 Dr. & War. 1; 2 H. L. 186; *Doe d. Winter v. Perratt*, 9 Cl. & F. 606; *Heasman v. Pearse*, 7 Ch. 275.

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limitations subsequent to an estate tail can be too remote.

The foundation of this rule is, that if the subsequent limitations are such, that they must take effect during the existence of the estate tail, or at the moment of its determination, or not at all, they are always barrable, and therefore do not tend to restrain the free disposal of property.

The test is that they must be barrable as long as they subsist.

And the converse follows, that, if the subsequent limitations are not always barrable, they will be subject to the rules of remoteness. The rule is sometimes laid down absolutely, that no limitations after estates tail are too remote, but it can only be accepted with the qualification above laid down. Otherwise, by means of limitations of equitable remainders which do not fail by failure of the prior estates, and are not barrable after the estate tail has determined, property might possibly be tied up for an almost indefinite time.

There seems to be no express decision on the point, but the rule as above laid down is involved in the decisions in *Lady Lanesborough v. Fox*, Ca. temp. Talbot, 262; *Tregonwell v. Sydenham*, 3 Dow. 194.

Where interests are precedent to estates tail, they are, of course, not barrable, and the ordinary rules of perpetuity apply. Therefore, where a term precedent to estates tail is limited to trustees, upon trusts which are too remote, the trusts are void. *Case v. Drosier*, 2 Kee. 764; 5 M. & Cr. 246; *Cochrane v. Cochrane*, 11 L. R. Ir. 361.

The trusts of a term precedent to an estate tail may be void for remoteness.

And where the term is precedent this will be the case, even though the event in which the trusts are to be executed would become impossible if the subsequent estates tail were barred. *Sykes v. Sykes*, 13 Eq. 56.

Similarly, powers not strictly precedent to, but concurrent with, an estate tail, for instance, powers to accumulate, during the minorities of any persons entitled under the limitations of the will, whether the accumulations are expressly carried over or not, or to enter and manage the property, are void. *Marshall*

Concurrent terms.

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*v. Holloway*, 2 Sw. 432; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Browne v. Stoughton*, 14 Sim. 369; *Turvin v. Newcome*, 3 K. & J. 16; *Floyer v. Banks*, 8 Eq. 114.

Trust for accumulation to pay debts is good.

But a trust for accumulation for the purpose of paying off debts or incumbrances upon the estate of the testator is valid. *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, 65; *Bateman v. Hotchkin*, 10 B. 426; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363.

A direction to accumulate till a fund reaches a certain sum.

And a direction to accumulate a fund till it reaches a certain amount, and then to apply it for the benefit of certain named persons for their lives, and the life of the survivor, is not void for perpetuity, if the fund, whether it has reached the amount directed or not, is to be divided at the death of the survivor. *Oddie v. Brown*, 4 De G. & J. 179.

Power of sale and leasing.

No doubt powers of sale and leasing would be void, if the testator clearly shows that he intended them to subsist, or to arise beyond the limits of perpetuity; see *Ware v. Polhill*, 11 Ves. 257; *Hale v. Pew*, 25 B. 335; *Goodier v. Johnson*, 18 Ch. D. 441, 446.

But powers of sale, whether collateral or subsequent, though given in general terms in a settlement containing limitations for life, with remainders in fee or in tail, with an ultimate remainder in fee, are good, because the power is spent as soon as the object of the settlement is at an end by the absolute interest vesting in possession. *Biddle v. Perkins*, 4 Sim. 135; *Nelson v. Callow*, 15 Sim. 353; *Waring v. Coventry*, 1 M. & K. 249; *Lantsbery v. Collier*, 2 K. & J. 709; *Taite v. Swinstead*, 26 B. 525.

Gift to persons who must be living at the testator's death and at the time of vesting cannot be too remote.

The vesting of property may be postponed for any length of time, provided it must ultimately vest, if at all, in persons born at the death of the testator, and living at the time of vesting, since in such a case it must vest absolutely within lives in being. *Lachlan v. Reynolds*, 9 Ha. 796.

But the gift is void for perpetuity, though it must vest in persons born within lives in being at the testator's death, and living when the event happens, if it may not so vest within lives in being and twenty-one years afterwards. *Jee v.*

*Audley*, 1 Cox, 324; see *Garland v. Brown*, 10 L. T. N. S. 292.

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It has been held, that in a gift to A. and B. for life, remainder to their issue for life, and after the decease of the survivor to the executors and administrators of the survivor of A. and B. or their issue, who should happen to be such survivor, the last remainder is not void for perpetuity. *Avern v. Lloyd*, 5 Eq. 383.

It seems clear that if the gift in remainder were construed to be to such one of the class composed of A. and B., and the issue living at their respective deaths, as should be the longest liver, it would be void for remoteness, since, though the class to take would be fixed within lives in being, the absolute vesting might be postponed till the death of all the issue but one.

On the other hand, if the gift could be construed to be to the issue living at the death of A. and B., or to the survivor of A. and B., if there are no issue to take, it would be good, since it must vest absolutely on the death of A. and B. But the case is doubtful. See *Stuart v. Cockerell*, 7 Eq. 363.

A limitation for life to the unborn children of a tenant for life, or to the descendants of two tenants for life, is good. *Avern v. Lloyd*, 5 Eq. 383; *Stuart v. Cockerell*, 7 Eq. 363; see 5 Ch. 713; *Hampton v. Holman*, 5 Ch. D. 183; *In re Roberts*; *Repington v. Roberts-Gawen*, 19 Ch. D. 520; overruling *Hayes v. Hayes*, 4 Russ. 311

Gift for life to unborn children of a tenant for life is good.

There appears to be no doubt that cross limitations for life between unborn tenants for life would be valid, and moreover, that limitations for life to successive generations to come into being within the bounds of perpetuity are also valid. *Ashley v. Ashley*, 6 Sim. 358; *Cadell v. Palmer*, 1 Cl. & F. 372; see, however, *Stuart v. Cockerell*, 7 Eq. 363, p. 370.

Cross limitation between unborn tenants for life.

Upon the same principle a limitation to the unborn children of a tenant for life, and the survivors and survivor of them, during the life of the longest liver, would be good, since the persons in whom the fee must vest, *i.e.*, all the children of the tenant for life, and the heir at law, would be ascertained at the death of the tenant for life. *Gooch v. Gooch*, 14 B. 565; 3 D. M. & G. 366.

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Substitution  
of issue.

If, however, the limitation is not simply to the survivors of the tenants for life, but to the survivors if there is no issue of the tenant for life dying, and if there is issue, then to the issue, the limitations over are bad. *Gooch v. Gooch*, 14 B. 565 3 D. M. & G. 366, 384.

Remote gift  
over of life  
interest.

Possibly, a gift over in certain events of the life interest of an unborn tenant for life would be void for remoteness. See *Hodgson v. Halford*, 11 Ch. D. 959.

Remainders  
after life  
interests of  
unborn per-  
sons.

After life interests to unborn persons, the absolute interest can be given to persons either living at the death of the testator or ascertained within the limits of perpetuity. *Evans v. Walker*, 3 Ch. D. 211; *In re Roberts*; *Repington v. Roberts-Gawen*, 19 Ch. D. 520.

But the absolute interest cannot be limited to a person who may not be ascertained within lives in being and twenty-one years afterwards. For instance, after life interests to unborn children a limitation to the eldest grandchild living at the determination of the life estates, or a limitation to the survivor of the tenants for life, would be void. *Gooch v. Gooch*, 3 D. M. & G. 366; *Garland v. Brown*, 10 L. T. N. S. 292.

Limitations  
dependent on  
void limita-  
tions are them-  
selves void.

Limitations following upon limitations void for perpetuity are themselves void, whether within the line of perpetuity or not. *Procter v. Bishop of Bath and Wells*, 2 H. Bl. 358; *Brudenell v. Elwes*, 1 East, 442; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25; *Thatcher's Trust*, 26 B. 365.

Alternate  
contingent  
limitations.

On the other hand, where the limitations are not subsequent but alternative, one of them being valid and the other too remote, effect will be given to the valid alternative, if the events on which it is limited occur. *Longhead v. Phelps*, 2 W. Bl. 704; *Crompe v. Barrow*, 4 Ves. 681; *Monypenny v. Dering*, 2 D. M. & G. 145; *Doe v. Challis*, 18 Q. B. 244; 7 H. L. 531; *Hodgson v. Halford*, 11 Ch. D. 959; *Miles v. Harford*, 12 Ch. D. 691, 703; *Watson v. Young*, 28 Ch. D. 436.

Gift to a class  
to be ascer-  
tained beyond  
the limits of  
perpetuity is  
void.

Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void. *Leake v. Robinson*, 2 Mer. 363; *Boughton v. Boughton*, 1 H. L. 406; *Merlin v. Blaggrave*,

25 B. 125; *Stuart v. Cockerell*, 7 Eq. 363; 5 Ch. 713; *Patching v. Barnett*, 49 L. J. Ch. 665; 51 *ib.* 74; *Blight v. Hartnoll*, 19 Ch. D. 294. Chap. XXXIV.

Similarly, where there is a gift after the death of an unborn tenant for life to the children and grandchildren of a living person, the gift is void for remoteness, the children and grandchildren being intended to form one class. *Stuart v. Cockerell*, 7 Eq. 363; 5 Ch. 713.

But if the remoter issue are to take substitutionally, the gift to the original class will be good, though the substitutional gifts may be void for remoteness. *Baldwin v. Rogers*, 3 D. M. & G. 649; *Packer v. Scott*, 33 B. 511; *Goodier v. Johnson*, 18 Ch. D. 441.

The rule against perpetuity applies where the gift is to a remote class, and a named person as tenants in common, the shares not being ascertainable within the proper limits. *Porter v. Fox*, 6 Sim. 485. Whether a gift to an individual and a remote class is void.

Perhaps, however, it would not apply to a similar gift in joint tenancy 1 Jarman, 266.

If by the application of the rules for ascertaining the class the class must be finally ascertained within the limits of perpetuity, the gift is good. *Picken v. Matthews*, 10 Ch. D. 264.

Where particular sums are given to each of the members of a class, the gift is good as to those members who are within the limits of perpetuity. *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Wilkinson v. Duncan*, 30 B. 111. Distinction between gift of a fund to a class and gift of a sum to each member of a class.

This principle has been extended to cases where, though the gift is in terms to a class, the effect of it is to give definite sums, ascertained at the determination of lives in being, to each of several classes, some of which are within and some without the line of perpetuity; for instance, if the gift is to A. for life, remainder to A.'s children for life, and the share of each child to go to his children, since the share of each of A.'s children is ascertained at A.'s death, the effect is to give a definite sum to each group of A.'s grandchildren, and the gift is good as regards those grandchildren whose parents were born in the testator's lifetime. *Griffith v. Pownall*, 13 Sim. 393; *Cattlin v. Brown*, Cases where it is possible to sever valid and remote shares.

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11 Ha. 372; *Knapping v. Tomlinson*, 12 W. R. 784; 10 Jur. N. S. 626.

And the principle is the same, where the gift is to A. for life, then to A.'s children living at his death, who should attain twenty-one, the share of each daughter to be settled on her for life, remainder to her children. In such a case the direction to settle was held good with regard to a child of A. *in esse* at the testator's death. *Wilson v. Wilson*, 4 Jur. N. S. 1076; 28 L. J. Ch. 95; *Herbert v. Webster*, 15 Ch. D. 610.

And, apparently, if the gift were directly to the grandchildren instead of through the direction to settle, the construction would be the same. *Greenwood v. Roberts*, 15 B. 92, which at first sight appears to decide the contrary, is explained by the M. R., in *Webster v. Boddington*, 26 B. 128, to have been decided on a different principle. Whether the principle was rightly applied, *quære*.

But if the share given to grandchildren is contingent upon events, which may happen beyond the limits of perpetuity, and the share may never become vested, in which event the shares taken by the other *stirpes* would be increased, then the shares of each *stirps* would not be ascertainable within the proper limits, and the whole will fail; for instance, if the gift is to A. for life, then to the children of A., and the children of such children who attain twenty-one, the children to take a parent's share. *Webster v. Boddington*, 26 B. 128; *Seaman v. Wood*, 22 B. 591; *Smith v. Smith*, 5 Ch. 342; *Hale v. Hale*, 3 Ch. D. 643; *Bentinck v. Duke of Portland*, 7 Ch. D. 693; *Pearks v. Moseley*, 5 App. C. 714; see *Salmon v. Salmon*, 29 B. 27.

Gift to a person satisfying a particular description is void unless there must be some such person within the limits of perpetuity.

Where there is a gift to a person by some particular description, the gift will be void, unless it is clear that there must be some person answering the description within the limits of perpetuity. Thus, a trust to convey to such person as for the time being would take by descent as heir male of the body of the testator's grandson, when some such person should attain the age of twenty-one, is void. *Lord Dungannon v. Smith*, 12 Cl. & F. 546; *Ibbetson v. Ibbetson*, 10 Sim. 495; 5 M. & Cr. 26; *Wainman v. Field*, Kay, 507; *Patching v. Barnett*, 28 W. R. 886.

How far the words, "as far as the rules of law and equity permit," would restrain the gift to such persons as satisfy the description within the limits of perpetuity, seems not clearly settled.

Where there was a gift (after life interests to the testator's wife, Lady Vere, and her son, Lord Vere) to the person who should from time to time be Lord Vere, it being the testator's will that the goods should be held with the title of the family, as far as the rules of law and equity permit, and the testator left a son, Lord Vere, and two sons of the son living at his death, the gift was held to vest absolutely in the first grandson who became Lord Vere. *Tollemache v. Earl of Coventry*, 2 Cl. & F. 611; 8 Bl. N. S. 547. See 12 Cl. & F. 555, note; *In re Viscount Exmouth*; *Viscount Exmouth v. Praed*, 23 Ch. D. 158. See, too, *per* Lord St. Leonards, in *Ker v. Lord Dunnington*, 1 Dr. & War. 536; and see *Mackworth v. Hinaman*, 2 Kee. 658.

It seems, a trust of chattels for the person or persons who should, for the time being, be in actual possession of certain settled estates, to the end that such chattels may go along with the same estates, "so far as the rules of law or equity will permit," but so that they shall not vest in any person becoming entitled to the estates for an estate of inheritance, unless he attain twenty-one, would be good, though in the absence of those words it would be bad. *Harrington v. Harrington*, L. R. 5 H. L. 87.

On the effect of the words, "as far as the law allows," see *Pownall v. Graham*, 33 B. 242.

Where personality is given upon the trusts of real estate, which has been settled upon living persons for life, remainder to their sons in tail, and there is a direction that the personality is not to vest in any tenant in tail who dies under twenty-one, the clause is not void for remoteness, but refers only to tenants in tail by purchase, since none but tenants in tail by purchase can be said to take personality under the will, personality not being descendible. *Christie v. Gosling*, L. R. 1 H. L. 279; *Martelli v. Holloway*, L. R. 5 H. L. 532.

In such a case, in the event of a tenant in tail by purchase

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Effect of the words "as far as the rules of law and equity permit."

*Tollemache v. The Earl of Coventry.*

Direction that personality is not to vest in a tenant in tail dying under 21.

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dying under twenty-one, leaving issue, the realty and personalty would become severed, since the realty would go to the issue, and the personalty to the next tenant in tail by purchase. But if the disposition of the personal estate contains or involves any trust for a tenant in tail who takes real estate by descent, the term tenant in tail could not be limited to tenants in tail by purchase. See *per* Lord Westbury, 1 D. J. & S. 1; *Ibbetson v. Ibbetson*, 10 Sim. 495; 5 M. & Cr. 26; *Ferrand v. Wilson*, 4 Ha. 344.

Power exercised within the limits of perpetuity is good.

Special powers.

A power, though authorising an appointment which would be void for perpetuity, is valid if the appointment is kept within the proper limits. *Slark v. Dakyns*, 10 Ch. 35.

In the case of powers of appointment to particular classes of persons, the person to whom the appointment is made must be capable of taking under the instrument creating the power. *In re Powell's Trusts*, 39 L. J. Ch. 188.

Where the power is a general power to appoint by deed or will, the appointees need only be capable of taking under the instrument exercising the power.

It would seem that the same principle should apply to a general power to appoint by will. *Rous v. Jackson*, 29 Ch. D. 521; not following *In re Powell's Trusts*, *supra*.

Special power.

Thus, where a marriage settlement gave a power to appoint to children of the marriage, an appointment to a son for life, with remainder to such persons as he should by will appoint, was held void as to the remainder. *Wollaston v. King*, 8 Eq. 165; *In re Brown & Sibly*, 3 Ch. D. 156; *Hodgson v. Halford*, 11 Ch. D. 959.

So a power in a settlement to appoint to children cannot be exercised by an appointment to take effect upon the marriage of an unmarried child. *Morgan v. Gronow*, 16 Eq. 1.

Invalid restrictions rejected.

When a power is well executed, but a restraint upon anticipation is imposed upon the enjoyment, which is void for remoteness, the restraint will be rejected. *Fry v. Capper*, Kay, 163; *Teague's Settlement*, 10 Eq. 564; *Cunynghame's Settlement*, 11 Eq. 324; see *ante*, p. 402.

And when there is an absolute gift, subsequent qualifications of the gift which are void for remoteness will be rejected. *Carver v. Bowles*, 2 R. & M. 306; *Ring v. Hardwick*, 2 B. 352.

## THE CY PRÈS DOCTRINE.

In many cases limitations of real estate, in themselves void for perpetuity, have been made good by the application of the so-called doctrine of *cy près*.

This doctrine is a rule of construction, and applies not merely *Cy près* to executory trusts. *Monypenny v. Dering*, 16 M. & W. 418; *Parfitt v. Hember*, 4 Eq. 443; *Hampton v. Holman*, 5 Ch. D. 183. doctrine is a rule of construction.

It also applies to the execution of a power by will. *Line v. Hall*, 43 L. J. Ch. 107.

1. Where a testator has devised lands in a manner trans-  
gressing the limits of perpetuity, and the Court can, by giving  
estates tail to any of the devisees, carry the property in the  
precise course marked out by the testator, supposing the estates  
left to themselves, it will do so. *Humberston v. Humberston*,  
1 P. Wms. 332; *Monypenny v. Dering*, 16 M. & W. 418; *Parfitt v. Hember*, 4 Eq. 443. Parent will take an estate tail where the effect will be to give the property in the course marked out by the testator.

Thus a limitation to an unborn person for life, remainder to his children successively in tail, will give the unborn person an estate tail; cases *supra*.

And the doctrine may be applied to some of a class, and not to others; as well as to a portion of the property included in a devise, and not to the rest. *Vanderplank v. King*, 3 Ha. 1; *Line v. Hull*, 22 W. R. 124; 43 L. J. Ch. 107. Doctrine applied to some members of a class and to part of the property devised.

2. And where, by giving an estate tail to the parent, all the objects intended to be benefited by the testator would be included, this construction will be adopted, although the children were meant to take jointly in tail as purchasers. *Pitt v. Jackson*, 2 B. C. C. 51, cit. 2 Ves. jun. 349; *Vanderplank v. King*, 3 Ha. 1; *Williams v. Teale*, 6 ib. 239. The doctrine applies though the children meant to take jointly in tail.

3. The doctrine will, however, not be applied where the result would be to carry the estate to persons not intended to be benefited by the testator. *Monypenny v. Dering*, 16 M. & W. 418; 7 Ha. 568; 2 D. M. & G. 174. Limits of the doctrine.

4. It has sometimes been said that the *cy près* doctrine does not apply where the only intention is to create successive life Whether it applies where the intention

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is to create  
life estates  
for ever.

estates for ever, but the point is not covered by authority. It is clear that the doctrine will not apply where the intention is only to create a limited number of life estates on the principle already stated. *Seaward v. Willock*, 5 East, 198.

Nor will it apply where successive terms of years, determinable on the death of the devisee, are given. *Somerville v. Lethbridge*, 6 T. R. 213; *Beard v. Westcott*, 5 B. & Ald. 81; T. & R. 25.

On the other hand, it is clear that where an estate tail is given by the force of the limitation itself, words indicating that the successive interests are to be for life will be rejected, whether the estate tail is given by direct words: *Doe d. Elton v. Stenlake*, 12, East, 515; *Reece v. Steel*, 2 Sim. 233; *Hugo v. Williams*, 14 Eq. 225; *Forsbrook v. Forsbrook*, 3 Ch. 93; or by the effect of a gift over in default of issue: *Mortimer v. West*, 2 Sim. 274; *Woollen v. Andrews*, 2 Bing. 126; *Brooke v. Turner*, 2 Bing. N. C. 422; *Parfitt v. Hember*, 4 Eq. 443.

On the whole, there seems to be no reason why the same construction should not apply where the testator attempts to create life estates for ever. See *per* Sir J. Rolt, in *Forsbrook v. Forsbrook*, 3 Ch. p. 99, and *Parfitt v. Hember*, 4 Eq. 443, where no stress was laid on the gift in default of issue. And on this ground only *Woollen v. Andrews* and *Mortimer v. West*, where the gift over was not on an indefinite failure of issue, can be held satisfactory. See *Hampton v. Holman*, 5 Ch. D. 183.

It does not  
apply where  
the children  
take in fee.

5. The *cy près* construction does not apply where the estates are limited to children of unborn persons in fee. *Bristow v. Warde*, 2 Ves. jun. 336; *Hale v. Pew*, 25 B. 335.

It does not  
apply to per-  
sonalty.

The doctrine does not apply to personalty nor to a mixed fund. *Routledge v. Dorril*, 2 Ves. jun. 365; *Boughton v. James*, 1 Coll. 44; 1 H. L. 406.

Where a parent having power to appoint to sons in tail appoints to them for life with remainders in tail, and puts them to their election between benefits given by the will and their rights in default of appointment, the doctrine of *cy près* has no application. *In re Denneby's Estate*, 17 Ir. Ch. 97.

## ACCUMULATION.

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A trust for accumulation beyond the limits of perpetuity is entirely void *ab initio*, whether before or since the Thellusson Act, and whether it be for a purpose excepted from the operation of the Act or not, unless it be for the payment of debts. *Trust for accumulation beyond the limits of perpetuity is void in toto.*  
*Curtis v. Lukin*, 5 B. 147; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Smith v. Cuninghame*, 13 L. R. Ir. 480.

And by the Thellusson Act, 39 & 40 Geo. III. c. 98, accumulation by will is restrained for any longer term than twenty-one years from the death of the testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the testator, or during the minority or respective minorities only of any person or persons who, under the trusts of the will, would for the time being, if of full age, be entitled to the rents and profits or the interest directed to be accumulated. *The Thellusson Act.*

By section 2 provisions for the payment of the debts of the deviser or other person or persons, and provisions for raising portions of the children of the deviser, or of any person taking any interest under the will, and directions touching the produce of timber or wood, are excepted from the Act.

An express direction to accumulate is not necessary to bring the property within the statute; it is enough if the property is given in such a manner that accumulation becomes necessary. *The statute applies if property is so given as to involve accumulation.*  
*Tench v. Cheese*, 6 D. M. & G. 453; *Macdonald v. Bryce*, 2 Kee. 276; the decree in *Countess of Bective v. Hodgson*, 10 H. L. 656; *Wade Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D. 374.

But when property is directed to be applied to certain purposes at once, but is accumulated owing to the neglect of trustees, or from some other reason, the statute does not apply. *Accumulation by trustees of money to be laid out at once is not within the statute.*  
*Lombe v. Stoughton*, 12 Sim. 304; where the direction to accumulate was merely subsidiary to the general trusts. See *Phipps v. Kelynge*, 2 V. & B. 57.

A direction to keep up policies effected by the testator in his lifetime on the lives of his children, the policies to be settled in *Direction to keep up policies is not*

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within the statute.  
Testator may select any one period permitted by the statute for accumulation.  
Period of 21 years runs from the death.
- case of marriage on their wives and children, is not a trust for accumulation within the statute. *Bassil v. Lester*, 9 Ha. 177; *In re Vaughan*; *Halford v. Close*, W. N. 1883, 89.
- A testator may direct accumulation during any one, but not more, of the periods allowed by the statute. *Wilson v. Wilson*, 1 Sim. N. S. 288; *Jagger v. Jagger*, 25 Ch. D. 729.
- The period of twenty-one years is to be calculated from the death of the testator, exclusive of the day of his death, and must be a period immediately following his death. *Webb v. Webb*, 2 B. 493; *Gorst v. Lowndes*, 11 Sim. 434; *Shaw v. Rhodes*, 1 M. & Cr. 154; *A.-G. v. Poulden*, 3 Ha. 555.
- Period of the minority of any person.
- The words of the statute permitting accumulation during the minority of any person who, under the trusts of the will, would, if of full age, be entitled to the rents and profits, do not permit accumulation during the period before the birth of such person. *Haley v. Bannister*, 4 Mad. 275; *Ellis v. Maxwell*, 3 B. 596.
- And it has been doubted, whether these words would authorise an accumulation during the minority of a person not born at the date of the will, but if not, they are superfluous. *Bryan v. Collins*, 15 B. 17; see *Peard v. Kekewick*, 15 B. 166.
- Accumulation directed for periods longer than the statute allows is void only for the excess.
- Accumulation directed within the limits of perpetuity, but beyond the limits of the statute, is void only beyond such limits. *Longdon v. Simson*, 12 Ves. 295; *Griffiths v. Vere*, 9 Ves. 127.
- Where there is a direction to accumulate income with a discretionary power to apply any part of the income towards the maintenance of infants, the power of maintenance continues after the period for accumulation limited by the Thellusson Act has expired. *Pride v. Fooks*, 2 B. 430.
- Accumulation for payment of debts is excepted from the statute.
- An accumulation for the purpose of paying debts, whether of the testator or other persons, is excepted from the Act, and is good, whether the debts be existing or future debts. *Varlo v. Faden*, 27 B. 255; 1 D. F. & J. 211; and see *Barrington v. Liddell*, 2 D. M. & G. 505.
- But the payment of debts must be *bond fide* and the primary object of the accumulation, and therefore if debts are only directed to be paid upon certain contingencies, and incidentally,

the case is not within the exception. *Mathews v. Keble*, 4 Eq. 467; 3 Ch. 691.

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A direction for payment of debts out of the annual income does not affect the rights of creditors, and if the debts are in fact paid out of *corpus* accumulation cannot go on for the purpose of recouping the *corpus*. *Tewart v. Lawson*, 18 Eq. 490.

And it seems an express direction to accumulate for the purpose of recouping *corpus* would be void. *Ib.*

The second exception is of portions for the children of the testator, or any person taking any interest under the will.

What are  
portions  
within the  
exception.

The children must be children either of the testator or of a person taking an interest under the will, and therefore if the accumulations are given to a class of children, some of whose parents take nothing under the will, the exception does not apply. *Eyre v. Marsden*, 2 Kee. 564.

But the interest taken by the parent under the will need not be an interest in the fund to be accumulated. *Burt v. Sturt*, 10 Ha. 423; *Barrington v. Liddell*, 2 D. M. & G. 500.

And any interest, however small, given to the parent is sufficient. *Barrington v. Liddell*, 2 D. M. & G. 505; *Evans v. Hillier*, 5 Cl. & F. 126.

As to what are portions within the exception:

A fund to be  
accumulated  
and given to  
children living  
at the period  
of distribution  
is not a  
portion.

A fund to be accumulated and given to such children as may be living at the time when the accumulations are to cease, is not within the exception. *Burt v. Sturt*, 10 Ha. 415; *Drewett v. Pollard*, 27 B. 196.

Nor are accumulations to be added to capital and given to a child or to the members of a family. *Edwards v. Tuck*, 3 D. M. & G. 40; *Morgan v. Morgan*, 4 De G. & S. 175; 20 L. J. Ch. 441; *Wildes v. Davies*, 1 Sm. & G. 475; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Jones v. Maggs*, 9 Ha. 605; *Mathews v. Keble*, 4 Eq. 467; 3 Ch. 691.

Nor is a fund directed to be accumulated and given to a parent for life with remainder to her children. *Watt v. Wood*, 2 Dr. & Sm. 56. *Middleton v. Losh*, 1 Sm. & G. 61, seems irreconcilable with the other decisions, unless it can be supported on the ground that the provision was called a portion; see 10 Ha. 426.

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Accumulation  
to pay portions  
charged by  
another  
instrument.  
Portions given  
by the will  
itself.

But a direction to accumulate a sum to pay portions charged by another instrument is within the exception. *Halford v. Stains*, 16 Sim. 488; *Barrington v. Liddell*, 2 D. M. & G. 505. And the exception extends also to portions created by the will itself. *Beech v. Lord St. Vincent*, 3 De G. & S. 678; 3 Jur. N. S. 762.

And when an accumulation is directed to raise portions for children if there are any, and if not for some other purpose, the case is within the exception only in the former event. *Re Clulow's Trust*, 1 J. & H. 639.

Legatee  
having a  
vested right  
may stop  
accumulation  
when he  
attains 21.

When there is an indefeasible gift, the legatee has a right to his property at twenty-one, and a direction to accumulate will only be valid till then; and this will be the case, it would seem, even though the direction to accumulate may be for a period exceeding the limits of the statute. *Gosling v. Gosling*, Johns. 265; *Coventry v. Coventry*, 2 Dr. & S. 470; *Phillips v. Phillips*, W. N. 1877, 260.

Case of  
charities.

This principle, however, does not apply where the legatees are charities. *Harbin v. Masterman*, 12 Eq. 559.

Statute does  
not accelerate  
interests in  
remainder.

Where a fund is given upon trust to pay certain annuities out of the income and to accumulate the rest, and the fund and accumulations are given after the death of the annuitants to a legatee absolutely, the legatee is not entitled to stop the accumulations during the lives of the annuitants, and to ask for payment of the fund after providing for the annuities. So far as the accumulation extends beyond the statutory period the income is undisposed of and goes to the heir-at-law or next of kin. *Talbot v. Jevers*, 20 Eq. 255; *Weatherall v. Thornburgh*, 8 Ch. D. 261.

The same result follows, though there is no express trust to accumulate, if a residue is given after the death of annuitants. *Re Hiscoe*; *Hiscoe v. Waite*, 48 L. T. 510.

Destination of  
excessive  
accumulation.

When property is given absolutely in the first place, and a direction is afterwards added to accumulate, the accumulations, so far as they are void by the statute, go to the person to whom the absolute interest is given. *Trickey v. Trickey*, 3 M. & K. 560; *Combe v. Hughes*, 34 B. 127; 2 D. J. & S. 657.

And where an estate is devised subject to a trust for accumula-

tion which is void, the trust sinks for the benefit of the persons for the time being entitled to the estates. *Evans v. Hellier*, 1 M. & Cr. 135; 5 Cl. & F. 114; *Re Clulow's Trust*, 1 J. & H. 639.

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But the effect of the statute is not to accelerate any gifts in the will. *Green v. Gascoyne*, 4 D. J. & S. 565.

Therefore accumulations released by the statute, if the fund to be accumulated is not a residue, in the case of personalty, go to form part of the capital of the residue. *Ellis v. Maxwell*, 3 B. 587; *A.-G. v. Poulden*, 3 Ha. 555; *Jones v. Maggs*, 9 Ha. 605; *Crawley v. Crawley*, 7 Sim. 427; *In re Tharel's Trusts*, 13 L. R. Ir. 337.

Accumulations released by the statute pass to the heir or next of kin, as the case may be, or to the residuary legatee if there is one.

In the case of realty the residuary devisee or heir is entitled according as the will is governed by the Wills Act or not. *Nettleton v. Stephenson*, 3 De G. & S. 366.

If the fund to be accumulated is residuary, the void accumulations go to the heir or next of kin, according to the nature of the property, and if the fund is mixed, to the heir and next of kin proportionately. *Green v. Gascoyne*, 4 D. J. & S. 565; *Halford v. Stains*, 16 Sim. 488; *Eyre v. Marsden*, 2 Kee. 564; 4 M. & Cr. 431; *Wildes v. Davies*, 1 Sm. & G. 475; *Ralph v. Carrick*, 5 Ch. D. 984; 11 Ch. D. 873; see *Elborne v. Goode*, 14 Sim. 165.

Accumulations of residue.

It seems that the income of accumulations not being a residue belongs to the tenant for life of the residue as income, and does not form part of the capital of the residue. *In re Phillips*; *Phillips v. Levy*, 49 L. J. Ch. 198; 28 W. R. 340; see, however, *Crawley v. Crawley*, 7 Sim. 427.

The income of accumulations forms part of the capital of the residue.

Income of accumulations of rents and profits retains its character of realty. *Eyre v. Marsden*, 2 Kee. 577.

When there is a contingent gift to A. with accumulation in the meantime, and the gift is given over to B. if the contingency does not happen, B., upon taking an indefeasible interest, is entitled to the accumulations within twenty-one years from the testator's death, together with the income of those accumulations. *Morgan v. Morgan*, 20 L. J. Ch. 111, 441; 15 Jur. 319; but see *Bryan v. Collins*, 16 B. 14.

## CHAPTER XXXV.

## CONDITIONS SUBSEQUENT.

**Chap. XXXV.** IN the case of conditions subsequent, if the condition is impossible, impolitic, or illegal, the gift remains, at any rate, where there is no gift over. *Thomas v. Howell*, 1 Salk. 170; *Walker v. Walker*, 2 D. F. & J. 255; *Wilkinson v. Wilkinson*, 12 Eq. 604.

Conditions subsequent, impossible, impolitic, or illegal, are ineffectual,

whether there is a gift over or not.

And it seems, even where there is a gift over, but the performance of the condition has become impossible, the previous gift remains. *Graydon v. Hicks*, 2 Atk. 16; *Jones v. Suffolk*, 1 B. C. C. 528; *Collett v. Collett*, 35 B. 312; *Sutcliffe v. Richardson*, 13 Eq. 606; and see *Wedgwood v. Denton*, 12 Eq. 290.

In most of these cases, however, the condition, being marriage with consent, became, by the death of the person, whose consent was required, a condition in general restraint of marriage. See, too, *Yates v. University of London*, L. R. 7 H. L. 438.

A condition forfeiting a legacy in the event of the legatee marrying a certain person without the testator's consent has been limited to a marriage in the testator's lifetime. *Booth v. Meyer*, 38 L. T. N. S. 125.

A condition must be so framed that it may be capable of ascertainment at any moment whether it has or has not taken effect. Thus, where a bequest of chattels to the owner of a title was followed by a direction that no person was to take an absolute interest till the expiration of twenty-one years after the death of all persons living at the testator's death and afterwards attaining the title, the direction was held void for uncer-

tainty. *In re Viscount Exmouth; Viscount Exmouth v. Chap. XXXV. Praed*, 23 Ch. D. 158.

A condition subsequent requiring the consent of several persons becomes impossible and is discharged by the death of all, or even of one of them, though in the latter case it would seem the condition is satisfied by the consent of the survivors. *Condition requiring marriage with consent of several persons becomes impossible by death of some.* *Peyton v. Bury*, 2 P. W. 625; *Grant v. Dyer*, 2 Dow. 73; *Jones v. Suffolk*, 1 B. C. C. 528; *Aislabie v. Rice*, 3 Mad 256; see *Dawson v. Oliver Massey*, 2 Ch. D. 753.

Where the consent of guardians is required and the testator appoints no guardians, an application should be made to the Court for the appointment of guardians, and the consent of a guardian appointed by the infant would not be sufficient. *Consent of guardians.* *In re Brown's Will*, 18 Ch. D. 61.

So where the consent of parents or guardians is required and the parents are dead, guardians must be appointed to give their consent. *Ib.*

A condition subsequent not performed owing to the ignorance of the legatee of its existence, nevertheless works a forfeiture, where the property is given over, whether in the case of personality or of realty. *Condition not performed through ignorance takes effect.* *Hodges' Trusts*, 16 Eq. 92; *Porter v. Fry*, 1 Vent. 197; *Astley v. Earl of Essex*, 18 Eq. 290.

But this does not apply, where the devisee is the heir who has a title independent of the will. *unless the devisee is heir.* *Doe d. Kenrick v. Lord Beauclerk*, 11 East, 667; *Doe d. Taylor v. Crisp*, 8 Ad. & E. 778; *Murphy v. Lineham*, I. R. 9 C. L. 123.

So, when there is a clause forfeiting a legacy, if not claimed within a given time, the forfeiture takes effect, if the legacy is not claimed, though the legatee received no notice of the legacy or of the death of the testator. *Condition forfeiting a legacy if not claimed.* *Burgess v. Robinson*, 3 Mer. 7; *Tulk v. Houlditch*, 1 V. & B. 248; *Powell v. Rawle*, 18 Eq. 243.

But the filing of a bill for the administration of the estate before the time appointed is equivalent to a claim by the legatees, though they may not be parties to the suit. *What amounts to a claim.* *Tollner v. Marriott*, 4 Sim. 19.

In the case of realty a valid condition subsequent is effectual even where there is no gift over. *A condition is effectual without a gift* *Cooke v. Turner*, 15 M. & W.

Chap. XXXV. 727; 14 Sim. 493; 15 Sim. 611; 16 Sim. 482; and see *Evanturel v. Evanturel*, L. R. 6 P. C. 1.

over in the  
case of realty.

In *Cooke v. Turner* there was a gift over, but the case seems to have been decided at common law independently of the gift over.

And a condition subsequent may operate to destroy a contingent, as well as to divest a vested estate. *Egerton v. Earl Brownlow*, 4 H. L. 1.

Personalty  
follows the  
rule as  
modified by  
the doctrine of  
*in terrorem*.

With regard to personalty, a condition subsequent is effectual without a gift over, except as far as the rules of the civil law have been adopted with regard to certain classes of conditions, see *post*, p. 422. *Dickson's Trust*, 1 Sim. N. S. 37; *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296.

Test of  
validity of a  
condition.

As to what conditions are valid, it has been said, that nothing can be made the subject of a condition in a will, which could not be made the subject of a contract or wager in life. See *per* the Lord Chief Baron, *Egerton v. Earl of Brownlow*, 4 H. L. 1, p. 150.

Condition of  
residence must  
be clearly  
defined.

Perhaps no general rule can safely be laid down; but, independently of the question whether a condition involves anything illegal or impolitic, in order that it may be effectual the meaning of the testator must be reasonably clear and precise; and, therefore, conditions to reside in a certain house, and to educate children in England, have been held too uncertain to work a forfeiture. *Fillingham v. Bromley*, T. & R. 530; *Clavering v. Ellison*, 3 Dr. 451; 7 H. L. 707.

A gift over in the event of a change of religion by the legatee is valid. *Hodgson v. Halford*, 11 Ch. D. 959.

Conditions decreasing an annuity if the annuitant again lives with her husband, or increasing a legacy to a husband in the event of a separation from his wife, are invalid. *Bean v. Griffiths*, 19 Jur. 1045; *Cartwright v. Cartwright*, 3 D. M. & G. 982.

Condition not  
to dispute a  
will.

A condition not to dispute a will is valid in law if the will is unsuccessfully disputed, though it will not avail to make an invalid disposition good. *Cooke v. Turner*, 15 M. & W. 727; *Evanturel v. Evanturel*, L. R. 6 P. C. 1; *Stevenson v. Abingdon*, 11 W. R. 935; see *Warbrick v. Varley*, 30 B. 347; *Hope v. International Financial Society*, 4 Ch. D. 327; *Phillips v.*

*Phillips*, W. N. 1877, 260; see *Massy v. Rogers*, 11 L. R. Ir. Chap. XXXV. 409.

On the other hand, a condition not to institute legal proceedings touching the estate and effects devised, is too general, and is bad. *Rhodes v. Muswell Hill Land Co.*, 29 B. 561.

A condition that trustees shall not pay over the shares of legatees without taking from them bonds that they will not intermarry or illegally cohabit with certain persons will not be enforced. *Poole v. Bott*, 11 Ha. 33.

#### CONDITIONS IN RESTRAINT OF MARRIAGE.

A condition in restraint of marriage applies only to a lawful marriage. *In re M'Laughlin*, 1 L. R. Ir. 42.

A condition subsequent in restraint of marriage, where the estates are for life or in fee, is, it seems, valid as regards realty. *Jones v. Jones*, 1 Q. B. D. 279; *Bellairs v. Bellairs*, 18 Eq. 510. Condition subsequent in restraint of marriage is good in realty.

But such a condition is void, if imposed upon a tenant in tail, as repugnant to the estate. *Earl of Arundel's Case*, 3 Dyer, 342 b. But not as regards an estate tail.

It is clear, that in the case of personalty a condition subsequent in general restraint of marriage is void, whether the condition forfeits or only reduces the gift. *Morley v. Rennoldson*, 2 Ha. 570; *Re Bellamy*; *Pickard v. Holroyd*, 48 L. T. 212. Condition in restraint of marriage is void in personalty.

And the same rule applies to a mixed fund arising from the proceeds of sale of realty and pure personalty. *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Bellairs v. Bellairs*, 19 Eq. 510. Mixed fund.

It would seem that the rule applies to real and personal estate given together. *Duddy v. Gresham*, 2 L. R. Ir. 443.

And it seems, that a legacy out of the proceeds of land directed by the testator to be converted would follow the same rule. See *Hart's Trusts*, 3 De G. & J. 195; *Bellairs v. Bellairs*, *supra*. Legacy out of proceeds of sale of land.

On the other hand, a limitation to a person till marriage is good, the intention being to provide for the person while he remains unmarried, and not to prevent him from marrying. *Potter v. Richards*, 24 L. J. Ch. 488; *Heath v. Lewis*, 3 D. M. & G. 954. Limitation till marriage is good.

And conditions in partial restraint of marriage are valid, both Conditions in

Chap. XXXV. with regard to realty and personalty, though with regard to the latter the further question arises whether they are *in terrorem* or not.

partial restraint of marriage are good though they may be ineffectual.

Thus, conditions restraining a widow or widower from marrying again, whether it be the widow of the testator or of a stranger: *Evans v. Rosser*, 2 H. & M. 190; *Newton v. Marsden*, 2 J. & H. 356; *Allen v. Jackson*, 1 Ch. D. 399; or requiring a marriage with consent: *Sutton v. Jewks*, 2 Ch. Rep. 95; or restraining marriage before a certain age: *Stackpole v. Beaumont*, 3 Ves. 89, are good as conditions, though they may be ineffectual if there is no gift over, on the principle hereafter mentioned.

So conditions against marriage with a Scotchman, or in a manner not in accordance with the rules of the Quakers, or with a person of a particular religion, or a domestic servant, are valid. *Perrin v. Lyon*, 9 East, 170; *Haughton v. Haughton*, 1 Moll. 611; *Duggan v. Kelly*, 10 Ir. Eq. 295, 473; *Hodgson v. Halford*, 11 Ch. D. 959; *Jenner v. Turner*, 50 L. J. Ch. 161; 29 W. R. 99.

In the case of real estate such a condition is valid even if there is no gift over. *Haughton v. Haughton*, 1 Moll. 611.

Doctrine of *in terrorem*.

In the case of personalty, certain conditions subsequent, though good in law, are, in accordance with the rule of the Civil Law, held to be void, and *in terrorem* merely, if there is no gift over.

It seems the doctrine that certain conditions are *in terrorem* merely applies to real estate when it is included with personalty in the same gift. *Duddy v. Gresham*, 2 L. R. Ir. 443.

Of this nature are the conditions in partial restraint of marriage already mentioned. *Marples v. Bainbridge*, 1 Mad. 590; *Reynish v. Martin*, 3 Atk. 330; *Wheeler v. Bingham*, 1 Wils. 135; 3 Atk. 364; *W. v. B.*, 11 B. 621.

And the same rule applies to a condition not to contest the will. *Powell v. Morgan*, 2 Vern. 90.

But if there is a gift over, these conditions are effectual, the gift over being considered sufficient evidence, that they were not meant to be *in terrorem* merely. *Cleaver v. Spurling*, 2 P. Wms. 526; *Tricker v. Kingsbury*, 7 W. R. 652; *Charlton v. Coombes*, 11 W. R. 1038; *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296.

On the question whether the doctrine of *in terrorem* applies to conditions precedent, the cases show :

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Whether the doctrine applies to conditions precedent.

1. A condition precedent, requiring consent to marriage generally, without limitation of age, is effectual if there is a gift over. *Malcolm v. O'Callaghan*, 2 Mad. 349; *Gardiner v. Slater*, 25 B. 509.

2. The gift of a smaller sum, in the event of marriage without consent, has the same effect. *Creagh v. Wilson*, 2 Vern. 572; *Gillett v. Wray*, 1 P. Wms. 284.

3. A condition precedent, requiring consent to marriage if under a certain age, is good if there is no gift over. *Stackpole v. Beaumont*, 3 Ves. 89.

4. A condition precedent not to marry under a certain age is good, though there is no gift over. *Yonge v. Furse*, 8 D. M. & G. 756.

5. A gift to a legatee, if he marries a particular person, only takes effect in that event. *Davis v. Angel*, 4 D. F. & J. 524. *Quære* whether *Smith v. Cowdery*, 2 S. & St. 358, is overruled.

6. But it seems a condition precedent requiring marriage with consent generally, and without a gift over, would be considered *in terrorem* merely. *Reeves v. Herne*, 5 Vin. Ab. 343, pl. 41; *Reynish v. Martin*, 3 Atk. 330; see *Clarke v. Parker*, 19 Ves. 1.

In cases under 4 and 5 the conditions can only be waived testamentarily, and no consent of the testator to a marriage in his lifetime, not within the condition, will make the gift good.

Waiver of conditions by the testator.

But where the condition is marriage with consent, whether precedent or subsequent, the consent of the testator to a marriage in his lifetime satisfies the condition. *Clarke v. Berkeley*, 2 Vern. 720; *Parnell v. Lyon*, 1 V. & B. 479; *Wheeler v. Warner*, 1 S. & St. 304; *Tweeddale v. Tweeddale*, 7 Ch. D. 633; see *Violett v. Brookman*, 5 W. R. 342.

Consent of the testator to a marriage in his lifetime satisfies a condition requiring consent.

And the condition does not apply to a subsequent marriage. *Hutcheson v. Hammond*, 3 B. C. C. 128; *Crommelin v. Crommelin*, 3 Ves. 227.

But in such a case the consent of a testator to a marriage to take place after his death does not obviate the necessity for the

Consent of testator to a marriage to

Chap. XXXV. consent of the persons named in the will. *Lowry v. Pattison*, I. R. 8 Eq. 372.

take place  
after his  
death.

And, where the gift is till marriage, the consent of the testator to a marriage does not extend the gift. *Bullock v. Bennett*, 7 D. M. & G. 283; see *Cooper v. Cooper*, 6 Ir. Ch. 217.

Condition of  
marriage with  
consent is  
satisfied by a  
second  
marriage with  
consent.

It seems, that where there is a gift upon marriage with consent, the legatee has her whole life to perform the condition and the legacy is not forfeited by a first marriage without consent. *Randall v. Payne*, 1 B. C. C. 55; *Beaumont v. Squire*, 17 Q. B. 905. *Clifford v. Beaumont*, 4 Russ. 325, was decided on the ground, that the gift was only upon a marriage with consent, which had not in fact been obtained. See, too, *Duddy v. Gresham*, 2 L. R. Ir. 443.

But if other provision is made for the legatee in the event of marriage without consent, the condition must be limited to a first marriage. *Lowe v. Manners*, 5 B. & Ald. 917.

Condition re-  
quiring the  
consent of  
several per-  
sons how  
performed.

In the case of a condition requiring the consent of several persons, if the consent required is that of executors or trustees, the consent of those who renounce or do not act is not necessary. *Worthington v. Evans*, 1 S. & St. 165; *Boyce v. Corbally*, Ll. & G. temp. Plunkett, 102; *Ewens v. Addison*, 4 Jur. N. S. 1034; *White v. M'Dermot*, I. R. 7 C. L. 1; see *Clarke v. Parker*, 19 Ves. 1.

But if there is only a single executor who renounces, his consent must, it seems, be obtained. *Graydon v. Hicks*, 2 Atk. 16; but the case is doubtful.

And a condition requiring the consent of several persons is performed by obtaining the consent of the survivors. *Ewing v. Anderson*, 7 W. R. 23; *Dawson v. Oliver Massey*, 2 Ch. D. 753.

If the consent of guardians is required, guardians must be appointed if there are none. *In re Brown's Trusts*, 18 Ch. D. 61.

Apportion-  
ment of con-  
dition.

Where a testator directs, that if a certain sum should be applied in favour of A., A. should apply a sum of different amount in favour of B., the condition will be compulsory on A. only if the whole of the sum in question is applied in his favour, and the condition will not be apportioned. *Caldwell v. Cresswell*, 6 Ch. 279; *Fazakerley v. Ford*, 4 Sim. 390.

A condition in a will must be performed according to its terms, and the Court has no power to relieve the legatee from any of them. Thus a right of pre-emption given to a person, if he pays a sum of money within a given time, followed by a disposition of the property if the money is not paid within the time, must be strictly complied with. *Brooke v. Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Austin v. Tawney*, 2 Ch. 143; see *Evans v. Stratford*, 10 L. J. N. S. 713.

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Right of  
pre-emption.

A right of pre-emption at a fixed price is not destroyed by a compulsory purchase under the Lands Clauses Act, and the person to whom the right is given may take the purchase money paid by the company less the fixed price. *Re Cant's Estate*, 4 De G. & J. 503.

Trustees directed to give a particular person a right of pre-emption at a fixed price are, it seems, not bound to make a good title, and ought not to incur costs in so doing. *In re Davison & Torrens*, 17 Ir. Ch. 7.

Similarly, a condition requiring a release within a given time, with a gift over, if the release is not given within the time, must be literally complied with. *Simpson v. Vickers*, 14 Ves. 341, 348.

Condition  
requiring a  
release.

But if there is no gift over, a release given within a reasonable time will satisfy the condition. *Simpson v. Vickers*, 14 Ves. 341; *Taylor v. Topham*, 1 B. C. C. 168; *Paine v. Hyde*, 4 B. 468; *Hollinrake v. Lister*, 1 Russ. 506; see *Scarlett v. Lord Abinger*, 34 B. 338; *Ledward v. Hassels*, 2 K. & J. 370.

A legacy given on condition of conveying real estate to a third person gives a legatee who has conveyed no lien upon the land for the legacy. *Barker v. Barker*, 10 Eq. 438.

As to the performance of conditions to take a particular name, see a valuable note in Davidson's Prec., vol. iii. 356, to which add *D'Eyncourt v. Gregory*, 1 Ch. D. 441.

Performance  
of conditions.

As to conditions of residence, see *Wynne v. Fletcher*, 24 B. 430; *Walcot v. Botfield*, Kay, 534; *Clavering v. Ellison*, 7 H. L. 707, and cases there cited; *Parry v. Roberts*, 19 W. R. 378; *Dunne v. Dunne*, 3 Sm. & G. 22; 7 D. M. & G. 207; *In re Moir*; *Warner v. Moir*, 25 Ch. D. 605.

## Chap. XXXV.

## REPUGNANT CONDITIONS.

Conditions repugnant to the estate previously given are void.

Restraints  
upon aliena-  
tion.

Thus, conditions in general restraint of alienation are bad, if absolute interests have been given in the first place.

Unlimited  
restraint.

1. Where there is a devise in fee, followed by an absolute restraint upon alienation, the restraint is void for repugnancy. *Litt.* 222 b. sec. 360; *Hood v. Oglander*, 35 B. 525.

Limited re-  
straint on  
alienation.

But a condition that the feeoffee shall not alien "to such a one, naming his name, or to any of his heires, or of the issues of such a one, etc., or the like," is said to be good. *Litt.* 223 a. sec. 361.

Upon this principle, conditions not to sell, except to a sister or sisters or their children, and not to sell out of the family, have been held valid. *Doe d. Gill v. Pearson*, 6 East, 173; *Re Macleay*, 20 Eq. 186; see *Ludlow v. Bunbury*, 35 B. 36; *Billing v. Welch*, I. R. 6 C. L. 88; see the principle discussed in *In re Rosher*; *Rosher v. Rosher*, 26 Ch. D. 801.

But a condition not to sell except to one person is bad, since a person might be selected who would be certain not to purchase. *Muschamp v. Bluett*, Bridg. 137; *Attwater v. Attwater*, 18 B. 330.

And a condition, that, if the devisee in fee should wish to sell in the lifetime of the testator's wife, she should have the option of purchasing at a price, which was about one-fifth of the value of the estate, has been held to be bad. *In re Rosher*; *Rosher v. Rosher*, 26 Ch. D. 801.

Alienation  
limited in  
time.

This case also decides, that a restraint upon alienation is bad though limited in point of time. Upon this question, see, too, *Renaud v. Tourangeau*, L. R. 2 P. C. 4; *Large's Case*, 2 Leon. 82; 3 Leon. 182; 2 Jerm. 18; *Churchill v. Marks*, 1 Coll. 445; *Kiallmark v. Kiallmark*, 26 L. J. Ch. 1.

Alienation by  
particular  
form of con-  
veyance.

In the same way, conditions restraining alienation by any particular form of conveyance, as by charge or mortgage, are bad. *Willis v. Hiscox*, 4 M. & Cr. 201; *Ware v. Cann*, 10 B. & Cr. 433.

Thus, a gift over of so much land as an absolute owner charges or incumbers would be bad. *Willis v. Hiscox*, *supra*.

The effect of the Settled Land Act, 1882, sec. 51, upon Chap. XXXV. conditions in restraint of alienation must also be borne in mind. *In re Paget's Will*, W. N. 1885, 143; 53 L. T. 90.

Directions that the rents upon property devised are not to be raised have been held invalid. *A.-G. v. Catherine Hall*, Jac. 395; *A.-G. v. Greenhill*, 33 B. 193. Direction not to raise rents.

These rules apply to personalty, so that if an absolute interest is given, a gift over if the legatee disposes of his interest is void. Gift over of personalty on alienation. *Bradley v. Peixoto*, 3 Ves. 324; *In re Jones's Will*, 23 L. T. N. S. 211.

And a gift over upon alienation by a tenant for life with a power of disposition by deed or will is invalid. *Re Wolstenholme*; *Marshall v. Aizlewood*, 43 L. T. N. S. 752.

It is however clear that absolute interests may be given over upon alienation before the period of possession. *Kearsley v. Woodcock*, 3 Ha. 185; *Re Payne*, 25 B. 556; *Pearson v. Dolman*, 3 Eq. 315. Gift over on alienation before period of distribution.

2. A condition giving over an estate in fee on bankruptcy of the devisee is void. *In re Machu*, 21 Ch. D. 838. Defeasance on bankruptcy.

3. A gift over, if the devisee or legatee does not dispose of his interest or dies intestate, is void both as regards realty and personalty. *Holmes v. Godson*, 2 Jur. N. S. 383; 25 L. J. Ch. 317; *Barton v. Barton*, 3 K. & J. 512; *Lightbourne v. Gill*, 3 B. P. C. 250; *Re Mortlock's Trusts*, 3 K. & J. 456; *Re Yalden*, 1 D. M. & G. 53; *Watkins v. Williams*, 3 Mac. & G. 622; *Henderson v. Cross*, 29 B. 216; *Perry v. Merritt*, 18 Eq. 152; *In re Wilcocks's Settlement*, 1 Ch. D. 229. Gift over if legatee dies intestate.

So a direction following a devise to tenants in common in fee that if no distribution should be made during the lives of the tenants in common the property should devolve to their children is invalid. *Shaw v. Ford*, 7 Ch. D. 669.

Such conditional gifts over are good according to Scotch law. *Barstow v. Pattison*, L. R. 1 H. L. Sc. 392.

It has been held that a gift over if the legatee does not dispose of his interest does not become valid by his death in the testator's lifetime. *Hughes v. Ellis*, 20 B. 193; *Greathed v. Greathed*, 26 B. 621; but these cases were doubted in *In re Stringer's Estate*; *Shaw v. Jones Ford*, 6 Ch. D. 1.

**Chap. XXXV.** 4. A gift over in the event of a previous gift being void at law or in equity is good. *De Themmines v. De Bonneval*, 5 Russ. 288.

5. A tenant in tail cannot by condition subsequent be prevented from barring his estate tail. *Dawkins v. Lord Penrhyn*, 4 App. C. 51.

Condition determining an estate tail in part.

A condition intended to determine an estate tail in part only, for instance, a clause directing that the interests of tenants in tail shall cease as concerns the rights and interests of the person making default, but not farther or otherwise, is void. *Seymour v. Vernon*, 10 Jur. N. S. 487; 12 W. R. 729.

Estate tail to cease as if the tenant in tail were dead.

A condition in certain events determining estates tail, as if the tenant in tail were dead, will be made good by supplying the words dead without issue. *Astley v. Earl of Essex*, 18 Eq. 290.

Absolute interest directed to cease as if the donee were dead.

But, if an absolute interest has been given, such a condition will be ineffectual, since the legatee's interest would not determine with his death, and, therefore, the interest directed to cease is not the exact interest previously given. *Bird v. Johnson*, 18 Jur. 976; *Catt's Trusts*, 2 H. & M. 46; 33 L. J. Ch. 495; *Musgrave v. Brooke*, 26 Ch. D. 792.

Conditions postponing enjoyment beyond 21.

6. So, too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of twenty-one are void, unless the property is otherwise disposed of in the meantime. *Saunders v. Vautier*, Cr. & Ph. 240; *Rocke v. Rocke*, 9 B. 66; *Re Young's Settlement*, 18 B. 199; *Gosling v. Gosling*, Johns. 265.

Life interest must be subject to the bankruptcy laws.

7. In the same way life interests must, as long as they last, be subject to the ordinary legal incidents attaching to property. A person cannot, for instance, be left in the enjoyment of property and at the same time exempted from the operation of the Bankruptcy Laws. *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66.

Whether a trust for maintenance passes to the creditors of a bankrupt.

A mere trust for maintenance during the life of a person at the discretion of trustees, without giving him any interest in the subject-matter of the bequest, has been held not to pass to his assignees upon bankruptcy: *Twopenny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, 10 Sim. 642, a very doubtful case. But the better opinion appears now to be, that though the

discretion might not be interfered with, so much as the trustees think fit to apply for the benefit of the bankrupt would pass to his creditors. See *Coe's Trust*, 4 K. & J. 199. Chap. XXXV.

If a life interest is given in the first instance, a clause directing the income to be applied towards the maintenance of the legatee after his bankruptcy will not prevent the interest from passing to the assignee. *Younghusband v. Gisborne*, 1 Coll. 401.

A discretion to trustees to pay or not to pay the income to the legatee for life determines on the bankruptcy of the legatee, unless the trustees are directed to withhold and accumulate the income, and the accumulations are given over. *Snowdon v. Dales*, 6 Sim. 524; *Piercy v. Roberts*, 1 M. & K. 4.

But although life interests are expressly given, they can be determined by a conditional limitation over upon bankruptcy or alienation by the legatee. *Rochford v. Hackman*, 9 Ha. 475; *Brooke v. Pearson*, 5 Jur. N. S. 781; *Knight v. Browne*, 7 Jur. N. S. 894; 30 L. J. Ch. 649; *Hurst v. Hurst*, 21 Ch. D. 278. Life interest may be determined on bankruptcy.

And a proviso for cesser of the life interest is sufficient without a limitation over. *Dommatt v. Bedford*, 6 T. R. 684; *Joel v. Mills*, 3 K. & J. 458.

It appears to be indifferent whether the original gift is only till bankruptcy, or whether it is a life interest with a conditional determination upon bankruptcy. The distinction between condition and limitation is immaterial.

A gift over upon alienation takes effect if the legatee alienates, though he may not have been aware of the condition. *Carter v. Carter*, 3 K. & J. 617.

A direction that the receipt of an annuitant shall be the only discharge which the executor shall be bound to accept, and that the annuitant may be required to attend to give receipts, does not prevent the annuitant from assigning. *Arden v. Goodacre*, 11 C. B. 883.

When the life interest is given over upon bankruptcy for the maintenance of the bankrupt and his family, half the income goes to his assignees. *Rippon v. Norton*, 2 B. 63. Effect of gift over for maintenance of bankrupt and his family.

But if the trustees have a discretion as to the amount to be applied towards the maintenance of the bankrupt and his family respectively, an inquiry will be directed as to how much ought

Chap. XXXV. to be applied for each. *Page v. Way*, 3 B. 20; *Kearsley v. Woodcock*, 3 Ha. 185; *Wallace v. Anderson*, 16 B. 533.

If, however, the trustees have a discretion to apply the fund for the maintenance of the bankrupt or his family their discretion remains, though whatever they think fit to apply for the bankrupt belongs to his creditors. *Lord v. Bunn*, 2 Y. & C. C. 98; *Holmes v. Penny*, 3 K. & J. 90; *Chambers v. Smith*, 3 App. C. 795.

Whether  
bankruptcy  
determines a  
power of ap-  
pointing to  
children.

It may be noticed that a gift over upon the bankruptcy of the tenant for life does not determine a power vested in him of appointing the property in question to his children, unless there are directions inconsistent with the subsistence of the power, such as a direction to distribute the property at once among the children in the event of bankruptcy. *Wickham v. Wing*, 2 H. & M. 436; *Haswell v. Haswell*, 28 B. 26; 2 D. F. & J. 456; see *Potts v. Britton*, 11 Eq. 433; *In re Stone's Estate*, 1 R. 3 Eq. 621.

Charge dis-  
claimed.

Where there is a gift over upon alienation the execution of a charge effects a forfeiture, though the charge is not acted on, and is renounced by the person in whose favour it is given. *Hurst v. Hurst*, 21 Ch. D. 278; see *Lockwood v. Sikes*, 51 L. T. 562.

Meaning of  
the term  
alienation.

Where the property is given over upon alienation the term has been held to include only voluntary alienation, and not a hostile bankruptcy. *Lear v. Leggett*, 1 R. & M. 690; *Pym v. Lockyer*, 12 Sim. 394; *Graham v. Lee*, 23 B. 388.

On the other hand, the presentation of a petition by the legatee under the Insolvent Debtors' Act, or under the arrangement clauses of the Bankruptcy Act, 1869, is a voluntary alienation. *Rochford v. Hackman*, 9 Ha. 475; *In re Amherst's Trusts*, 13 Eq. 464.

If there is a strong intention of personal benefit to the legatee, as if the gift is to him for life and not to his assigns, a gift over upon alienation has been held to include bankruptcy. *Cooper v. Wyatt*, 5 Mad. 482.

"Do or  
suffer."

If the property is given over if the legatee should "do or suffer," or "do or permit" anything whereby the property would be vested in another, this includes a hostile bankruptcy. *Roffey v. Bent*, 3 Eq. 739; *Ex parte Eyston*; *In re Throckmorton*, 7 Ch. D. 145.

Under similar words the issue of a writ of sequestration Chap. XXXV. against the legatee has been held to work a forfeiture. *Dixon v. Rowe*, 35 L. T. N. S. 549.

The execution of a deed of inspectorship is not within a gift Deed of inspectorship. over in the event of the legatee taking the benefit of any Act for the relief of insolvent debtors. *Montefiore v. Enthoven*, 5 Eq. 35.

As to the meaning of alienation, see *Avison v. Holmes*, 1 J. & H. 530, p. 540.

Insolvency has no technical meaning, but means inability to Meaning of insolvency. pay debts. *Freeman v. Bowen*, 35 B. 17; *Re Muggeridge*, Joh. 625; 29 L. J. Ch. 288; see *De Tastet v. Le Tavernier*, 1 Kee. 161; *Billson v. Crofts*, 15 Eq. 314; *Nixon v. Verry*, 29 Ch. D. 196.

A declaration of insolvency in S. Australia is insolvency within the meaning of a gift over upon insolvency. *Aylwin's Trusts*, 16 Eq. 585; see *In re Levy's Trusts*, 33 W. R. 895.

A gift over of a life interest given to the testator's widow in Marriage. the event of her doing anything whereby she would be deprived of the right to receive the rents takes effect upon the marriage of the widow without making any settlement. *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296.

The execution of an irrevocable power of attorney to receive Power of attorney. an annuity is within a clause of forfeiture in the event of assignment or disposition by way of anticipation. *Oldham v. Oldham*, 3 Eq. 404.

Where the property is given over upon bankruptcy, the gift Gift over upon bankruptcy includes a subsisting bankruptcy. over, *primâ facie*, includes a bankruptcy which takes place after the date of the will and is subsisting at the testator's death, notwithstanding strong words of futurity. *Yarnold v. Moorhouse*, 2 R. & M. 364.

And it has been held to include a bankruptcy which took place before the date of the will, and was subsisting at the death. *Manning v. Chambers*, 1 De G. & S. 282; *Seymour v. Lucas*, 1 Dr. & Sm. 177; *Trappes v. Meredith*, 10 Eq. 604; 7 Ch. 248.

But since the object of the gift over is merely to preserve the property from going to strangers, if the bankruptcy is annulled A bankruptcy annulled before the period of distribution will not work a forfeiture. before the period of distribution the forfeiture does not take effect. *Lloyd v. Lloyd*, 2 Eq. 722; *Trappes v. Meredith*, 9 Eq.

Chap. XXXV. 229; *In re Parnham's Trusts*, 46 L. J. Ch. 80; *Samuel v. Samuel*, 12 Ch. D. 152 see *Robins v. Rose*, 43 L. J. Ch. 334; *Robertson v. Richardson*, 33 W. R. 897.

In the case of an immediate gift it appears the forfeiture will not take effect, where the bankruptcy is annulled within a year from the testator's death if there is no right to any payment till then. *Lloyd v. Lloyd*, 2 Eq. 722; *Ancona v. Waddell*, 10 Ch. D. 157.

This principle would not apply if one of the terms of the annulment is that the dividends accruing up to that time should be paid to the assignee. *In re Parnham's Trusts*, 13 Eq. 413.

In the case of an immediate specific bequest for life it was held that a clause of forfeiture did not operate, as the bankruptcy had been annulled before the day on which the first income was payable. *White v. Chitty*, 1 Eq. 372. See, however, *Samuel v. Samuel*, 12 Ch. D. 152.

These principles have no application where the freedom from bankruptcy is a condition precedent to the vesting. *Cox v. Fonblanque*, 6 Eq. 482; see *Samuel v. Samuel*, *supra*.

Bankruptcy  
during prior  
life estate.

Similarly, if the life interest given over on bankruptcy is subject to a prior life interest, the gift over takes effect on a bankruptcy during the life of the prior tenant for life. *Sharp v. Cosserat*, 20 B. 470; *Muggeridge's Trust*, Johns. 625.

And a gift over upon bankruptcy will carry over an accrued share directed to go in the same manner as the original share, though not accruing till after bankruptcy. *Dorsett v. Dorsett*, 30 B. 250.

Separate  
estate.

8. Under the Married Women's Property Act, 1882 (sec. 2), every woman married since the Act may hold as her separate property, and dispose of as if she were a *feme sole*, all real and personal property belonging to her at the time of her marriage or acquired or devolving upon her after marriage.

And by section 5, every woman married before the Act may hold and dispose of in manner aforesaid, as her separate property, all real and personal property, the title to which accrues after the commencement of the Act.

It would seem that in the cases above mentioned a married

woman may take and dispose of the legal estate in land, and that a deed acknowledged is not necessary.

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It has been thought that the effect of the Act is to deprive the husband of his marital rights if his wife dies intestate.

Whether  
Married  
Women's  
Property Act  
destroys  
marital rights  
on intestacy.

*In re Worman*, 1 Sw. & T. 513, has been cited in support of this view, but that was a case decided under 20 & 21 Vict. c. 85, which provides in effect (sections 21 and 25) that a woman who has obtained a protection order shall be considered as a *feme sole* with regard to property, and she may dispose of her property, and on her decease intestate the same is to go as it would have gone if her husband had been then dead.

There is nothing similar to this in the Married Women's Property Act, and it is very unlikely that that Act will be held to alter the husband's right if his wife dies intestate.

Before the Married Women's Property Act, 1882, it was settled that the corpus as well as the income of real or personal estate might be given to the separate use of a married woman. *Taylor v. Meads*, 4 D. J. & S. 607; *Cooper v. Macdonald*, 7 Ch. D. 288.

Separate use.

The separate use may of course be so framed as to apply to the rents and profits only, and not to the corpus. *Troutbeck v. Boughey*, 2 Eq. 534.

In cases not within the Married Women's Property Act, 1882, the effect of the separate use as regards the capital is to give the married woman a power of disposition.

Separate use  
before the  
Married  
Women's  
Property Act,  
1882.

If the married woman does not exercise her power of disposition the separate use is exhausted, and upon her death the husband's rights revive.

Therefore, in the case of land given to the separate use of a married woman who dies without making a disposition, the husband is entitled to an estate by the curtesy. *Roberts v. Dixwell*, 1 Atk. 607; *Follett v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, 8 Eq. 139; *Cooper v. Macdonald*, 7 Ch. D. 289; overruling *Hearle v. Greenbank*, 3 Atk. 675; and *Moore v. Webster*, 3 Eq. 267.

Effect of  
separate use  
on curtesy.

The case of *Bennett v. Davis*, 2 P. Wms. 316, is sometimes cited as an authority, that an express declaration that curtesy is not to attach to lands given to the separate use of a married

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woman would be effectual where no disposition is made of the lands. The question did not arise in the case, as both husband and wife were alive.

Chattels real  
to separate  
use.

Chattels real belonging to the wife to her separate use vest in the husband, *jure mariti*, if she dies without disposing of them. *Archer v. Lavender*. I. R. 9 Eq. 220.

Chattels in  
possession.

And it seems chattels in possession belonging to the wife to her separate use, and not disposed of, belong to the husband without the necessity of taking out administration to the wife. *Molony v. Kennedy*, 10 Sim. 254; *Bird v. Peagram*, 13 C. B. 639.

In cases not within the Married Women's Property Act, 1882, the marital right will be held to be excluded only by a clear indication of intention to exclude it.

What words  
create a  
separate use.

The word "separate" is sufficient for this purpose, whether the legatee is married or not. *Archer v. Rorke*, 7 Ir. Eq. 478.

On the other hand, such words as "own use," "absolute use," or to pay to "her own proper hands," are not enough, whether the legatee is married or single, or whether trustees are interposed or not. *Rycroft v. Christy*, 3 B. 238; *Tyler v. Luke*, 2 R. & M. 183; *Blacklow v. Laws*, 2 Ha. 49; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Wills v. Sayer*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Beales v. Spencer*, 2 Y. & C. C. 651.

Disposal.

But if the legatee is married at the time and the legacy is directed to be at her own disposal, a separate use is created. *Kirk v. Paulin*, 7 Vin. Ab. 95, pl. 43; *Prichard v. Ames*, T. & R. 222; *Bland v. Dawes*, 17 Ch. D. 794.

Separate  
receipt.

Directions that the receipt of a legatee, "notwithstanding coverture," and that her "sole and separate receipt" should be a good discharge, have been held to create a separate use. *Cooper v. Wells*, 11 Jur. N. S. 923; *In re Molyneux's Estate* I. R. 6 Eq. 411.

The same has been held where the legatee was married, and her receipt was declared to be a sufficient discharge. *Lee v. Prieaux*, 3 B. C. C. 381; *Re Lorimer*, 12 B. 521.

And where a legacy was given, if husband and wife should not be living together, half to the husband and half to the wife

absolutely, the wife took to her separate use. *Shewell v. Dwarries*, Johns. 172.

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So, too, a direction that the devisee is to receive the rents herself, whether married or single, creates a separate use. *Goulden v. Camm*, 1 D. F. & J. 146.

Probably a gift for the maintenance and support of a woman referred to by the testator as married would create a separate use. *Darley v. Darley*, 3 Atk. 399; *Cape v. Cape*, 2 Y. & C. Ex. 543; see *Wardle v. Claxton*, 9 Sim. 524.

And a power given to trustees to apply income for the maintenance and support of a widow authorises payment of the income to her separate use. *Austin v. Austin*, 4 Ch. D. 233; see *In re Peacock's Trusts*, 10 Ch. D. 490.

The word sole may in some cases be sufficient to create a separate use, but *prima facie* it has no such technical meaning and the burden of proof is upon those who assert it has. *Lewis v. Mathews*, 2 Eq. 177; *Massy v. Rowen*, L. R. 1 Ir. Eq. 110; *ib.*, 4 H. L. 288.

Effect of the  
word "sole"  
in creating a  
separate use.

In a marriage settlement where the whole object is to secure to the wife a separate estate, the word may have the force of separate. *Ex parte Ray*, 1 Madd. 199.

But in a will where no such intention can be presumed, further indication is necessary.

a. A gift to "A., the wife of B., for her sole use," creates a separate use. *Inglefield v. Coghlan*, 2 Coll. 247; *Farrow v. Smith*, W. N. 1877, 21; *In re Amies' Estate*; *Milner v. Milner*, W. N. 1880, 16; *Bland v. Dawes*, 17 Ch. D. 794.

b. The same has been held where though the legatee was not in the gift to her referred to as married, it appeared from other parts of the will that she was a married woman. *Green v. Britten*, 1 D. J. & S. 649; *Hartford v. Power*, I. R. 2 Eq. 204.

But this is not the case if the legatee be the testator's own wife, so that she must be discovert when the will takes effect, *Gilbert v. Lewis*, 1 D. J. & S. 38; *Green v. Marsden*, 1 Dr. 646.

c. If the legatee is unmarried at the time, but the testator shows that he contemplates her marriage, and expressly wishes to guard against the claims of a future husband, the same

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effect will follow. *Ex parte Killick*, 3 M. D. & De G. 486; *In re Tarsey's Trust*, L. R. 1 Eq. 561; see *Baker v. Ker*, 11 L. R. Ir. 3.

*d.* So, too, if a trust is created confined to the particular gift, and no other motive for it is discernible. *Adamson v. Armitage*, 19 Ves. 416.

But the mere interposition of trustees will not give the word the force of separate if the trust is created for the general purposes of the will, and not confined to the particular gift. *Massy v. Rowen*, L. R. 4 H. L. 288.

Restraint  
upon anticipa-  
tion of  
income.

8. It is clearly settled that a married woman may be restrained from anticipating the rents and profits of real estate and the income of personalty given to her separate use.

A restraint upon anticipation applicable to the rents of real estate devised to a married woman in tail does not prevent her from enlarging the estate tail to a fee with her husband's consent. *Cooper v. Macdonald*, 7 Ch. D. 289.

The case would probably be the same if the restraint upon anticipation were expressly applied to the corpus. *Cooper v. Macdonald*, *supra*.

A married woman entitled to real estate for life to her separate use without power of anticipation, with a testamentary power of disposition, may release her power under the Act for the abolition of fines and recoveries. *Heath v. Wickham*, 5 L. R. Ir. 285.

Restraint  
applied to  
corpus of  
property pro-  
ducing income.

In the case of a restraint upon anticipation applied to the corpus of real estate, the effect appears to be to restrain the married woman from disposing either of the income or the corpus during coverture except by will. *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627.

Restraint  
upon anticipa-  
tion of fund  
of personalty.

In the case of a fund of personalty given to a married woman with a restraint upon anticipation, a distinction has been drawn between a fund invested so as to produce income, and a gift of a share of proceeds of sale or cash not producing income, the restraint upon anticipation being held effectual in the former case, and ineffectual in the latter. See *In re Ellis' Trusts*, 17 Eq. 409; *In re Croughton's Trusts*, 8 Ch. D. 460; *In re Benton*; *Smith v. Smith*, 19 Ch. D. 277; *In re Clarke's Trusts*,

21 Ch. D. 748; *In re Taber*; *Arnold v. Kayess*, 46 L. T. 805; 51 L. J. Ch. 721; 30 W. R. 883; *In re Coombes*; *Coombes v. Parfitt*, W. N. 1883, 169; see, too, *Re Sarel*, 4 N. R. 321; 10 Jur. N. S. 876; *Re Gaskell's Trusts*, 11 Jur. N. S. 780; *Re Sykes' Trusts*, 2 J. & H. 415.

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This distinction is now overruled. The true test is, does the testator intend the fund to be paid to the married woman, or does he intend her to enjoy it only in the shape of income. *In re Bown*; *O'Halloran v. King*, 27 Ch. D. 411.

If, therefore, the fund is to be transferred or paid to the married woman, the restraint upon anticipation is ineffectual. If, on the other hand, there is anything to show that the fund is to be retained by the trustees, and the income only paid to the married woman during coverture, the restraint takes effect. *In re Bown*; *O'Halloran v. King*, 27 Ch. D. 411.

If there is a previous life interest, and the reversion is given to a married woman with a restraint upon anticipation, it would seem that the restraint prevents the married woman from alienation during the subsistence of the life tenancy. *In re Bown*; *O'Halloran v. King*, 27 Ch. D. 411.

The restraint upon anticipation attaches only to the separate estate, and therefore determines with coverture. *Barton v. Briscoe*, Jac. 603; *Jones v. Salter*, 2 R. & M. 208; *Woodmeston v. Walker*, 2 R. & M. 197.

Determines  
with coverture.

If nothing is done with the property in the meantime it revives on future coverture. *Tullett v. Armstrong*, 1 B. 1; 4 M. & Cr. 390; *Scarborough v. Borman*, 1 B. 34; 4 M. & Cr. 378; *Re Gaffee*, 1 Mac. & G. 541.

The restraint may be confined to marriage with a particular husband by name. *Morris v. Morris*, 4 Dr. 33; *Hawkes v. Hubbuck*, 11 Eq. 5; see *In re Molyneux's Estate*, 1 R. 6 Eq. 411.

A sale or conversion of the property destroys the separate use. *Wright v. Wright*, 2 J. & H. 647.

Difficulties have sometimes arisen as to what words are necessary to create a restraint on anticipation.

What words  
create a re-  
straint upon  
anticipation.

A direction that there is to be no sale or mortgage of the estate devised or the rents arising from it during the life of

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the devisee, amounts to a restraint on anticipation. *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627; *Goulden v. Camm*, 1 D. F. & J. 146; *Steedman v. Poole*, 6 Ha. 193.

The same has been held of a direction that the receipts of the devisee alone, after the payment of the rents devised shall have become due, should be sufficient discharges. *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 D. M. & G. 597; *White v. Herrick*, 21 W. R. 454; *In re Smith*; *Chapman v. Wood*, 51 L. T. 501.

But a direction to pay to the legatee personally, or on her receipt alone, will not restrain anticipation. *Re Ross's Trust*, 1 Sim. N. S. 196; *Wagstaff v. Smith*, 9 Ves. 520, 524; *Acton v. White*, 1 S. & St. 429.

When the legatee has a power to appoint the accruing rents, but not by way of anticipation, and in default of appointment there is a gift to her for her separate use, the restraint upon anticipation applies only to the exercise of the power. *Barrymore v. Ellis*, 8 Sim. 1; *Medley v. Horton*, 14 Sim. 222.

But if the gift in default of appointment is followed by a receipt clause applied to the same rents as those she has power to appoint, the restraint upon anticipation will extend to the whole gift. *Moore v. Moore*, 1 Coll. 54; *Brown v. Bamford*, 1 Ph. 620.

## CHAPTER XXXVI.

## LIMITATIONS BY WAY OF REMAINDER—DIVESTING.

## WHAT CANNOT BE GIVEN OVER.

IN some things nothing less than an absolute interest can be given.

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There can be no remainder in the strict sense of the word of chattels. At law a grant of chattels for life vests the whole legal interest in the tenant for life.

Remainder in  
chattels.

This rule, however, does not apply to gifts by will. It has long been settled that under a gift by will of a term to A. for life, and after his death to B., or to the children of A., the legal interest passes by way of executory devise to the person entitled under the will on the death of the tenant for life. *Manning's Case*, 8 Rep. 94 b; *Lampet's Case*, 10 Rep. 46 b; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

In some cases the nature of the property is such as not to allow of successive limitations; thus:—

Things *quæ ipso usu consumuntur* cannot be given over, unless they form part of a stock-in-trade. *Randall v. Russell*, 3 Mer. 190; *Andrew v. Andrew*, 1 Coll. 690; *Groves v. Wright*, 2 K. & J. 347; *Bryant v. Easterson*, 7 W. R. 298; 5 Jur. N. S. 166; *Phillips v. Beal*, 32 B. 25; *Cockayne v. Harrison*, 13 Eq. 432; see *Re Hall's Will*, 19 Jur. 974.

Consumable  
articles cannot  
be given over.

Even in the case of stock-in-trade if the tenant for life is not to be liable for depreciation he takes absolutely. *Breton v. Mockett*, 9 Ch. D. 95.

Absolute interests can of course not be limited over by way of remainder; thus a devise, if A. dies without heirs, after a

There can be  
no remainder

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after an absolute interest.

A gift over invalid in itself does not become valid by the death of the prior legatee before the testator.

Gift over of so much as a legatee does not dispose of is void.

Gift over after a life interest, with power of disposition.

prior devise to A. in fee, is void. *Tilbury v. Tarbut*, 3 Atk. 617; 1 Ves. sen. 88.

And in the same way absolute interests in personalty cannot be given to several persons in succession. *Byng v. Lord Strafford*, 5 B. 558; see *In re Percy*; *Percy v. Percy*, 24 Ch. D. 616.

A gift over, which would be invalid supposing the prior legatee survives the testator, does not become valid by his death in the testator's lifetime.

Therefore, a gift of personalty to A. and the heirs of his body, remainder to B., lapses by A.'s death in the testator's lifetime. *Harris v. Davis*, 1 Coll. 416; see, however, *In re Stringer's Estate*; *Shaw v. Jones-Ford*, 6 Ch. D. 1.

So, too, a gift of consumable articles to A. for life, remainder to B., lapses by A.'s death before the testator. *Andrews v. Andrews*, 1 Coll. 690.

There can be no gift over of so much as a legatee does not dispose of where an absolute interest has been given to the legatee. *Watkins v. Williams*, 3 Mac. & G. 622; *Henderson v. Cross*, 29 B. 216; *Bower v. Goslett*, 27 L. J. Ch. 249; 6 W. R. 8.

Such a limitation is, however, valid in a settlement. *Turner v. Caulfield*, 7 L. R. Ir. 347.

Nor can there be a gift over of what remains after payment of the debts of a legatee to whom an absolute interest is given. *Perry v. Merritt*, 18 Eq. 152.

However, a gift at the legatee's death of whatever remains after a gift to the legatee indefinitely may be construed as a disposition of the residue at the legatee's death, so as to cut him down to a life estate. *Constable v. Bull*, 3 De G. & Sm. 411; *Adams' Trust*, 14 W. R. 18; *Bibbens v. Potter*, 10 Ch. D. 733; see *In re Russell's Trusts*, 53 L. J. Ch. 400; reversed, W. N. 1885, 21.

And if a fund is given to a person expressly for life, with a power of disposing of it during life or by will, a gift of it after the death of the donee of the power is good, so far as the power is not exercised. *Pennock v. Pennock*, 13 Eq. 144; *In re Thomson's Estate*; *Herring v. Barrow*, 13 Ch. D. 144; 14 *ib.*

263; *In re Stringer's Estate*; *Shaw v. Jones-Ford*, 6 Ch. D. 1; *Moore v. Ffolliott*, 11 L. R. Ir. 206; see *Re Brook's Will*, 2 Dr. & S. 362; *In re Heginbotham*; *Wilson v. Heginbotham*, W. N. 1884, 179.

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An executory gift over of an estate *pur autre vie* given to a man and his heirs is valid, and cannot be destroyed by the devisees in fee. *In re Barber's Settled Estates*, 18 Ch. D. 624.

*Estate pur  
autre vie.*

### LIMITATIONS DISTINGUISHED.

Limitations (excluding immediate limitations of particular estates) fall most naturally into limitations disposing of property in which partial or contingent interests have been previously given, and limitations varying and re-arranging previous dispositions.

A legal remainder of freehold must be supported by a previous estate of freehold, otherwise it can only be supported as an executory devise.

*Legal re-  
mainder and  
executory  
interests.*

And as no limitation can be a remainder following upon an estate less than an estate for life, so no limitation can be a remainder following upon a determinable fee, or any greater estate. *Fearne*, C. R. 225; *Seymour's Case*, 10 Co. 95 b.

But where an estate can take effect as a remainder, it will never be construed an executory devise or springing use. *Curwardine v. Curwardine*, 1 Ed. 27; *Goodtitle v. Billington*, Dougl. 725; *Fearne*, C. R. 386; *Doe d. Scott v. Roach*, 5 M. & S. 482; the reason given being that "executory interests, not by way of remainder, unless engrafted on an estate tail, cannot be barred, and consequently there is a tendency in such interests to a perpetuity, which is contrary to the policy of the law." *Smith's Ex. Dev.* 71.

The death of the testator is the time to ascertain whether a limitation is a contingent remainder or an executory devise. Thus, under a devise to A. for life, and then to the first and other sons of B. in tail, if A. dies in the lifetime of the testator, and B. has no sons living at the testator's death, the devise to the sons of B. will take effect as an executory limitation. *Hopkins v. Hopkins*, Ca. t. Talb. 44.

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Where there is a gift to A. for life, with remainder to such of her children as before or after her death attain twenty-one, the devise must be construed as executory, as in the case of children under twenty-one at the death of A. it could not take effect as a remainder. *In re Lechmere and Lloyd*, 18 Ch. D. 524; *Mills v. Jarvis*, 24 Ch. D. 633.

Incidents of  
remainders.

Contingent remainders can no longer fail by forfeiture, surrender, or merger, but (except in cases within 40 & 41 Vict. c. 33) they will fail by the failure of the particular estate of freehold, before the remainder is ready to come into possession. *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; *Price v. Hall*, 5 Eq. 399; *Percival v. Percival*, 9 Eq. 386; *Brackenbury v. Gibbons*, 2 Ch. D. 417.

Contingent remainders of copyholds are liable to fail in the same way by failure of the particular estate before they have vested, see *ante*, p. 231.

This rule does not apply to equitable remainders, which are not remainders proper but in the nature of executory interests. *Hopkins v. Hopkins*, 1 Atk. 581; *Re Eddel's Trust*, 11 Eq. 559.

A legal estate outstanding in a mortgagee is sufficient to support the remainders. *Astley v. Micklethwait*, 15 Ch. D. 59.

The rule does not, of course, apply to personalty.

By 40 & 41 Vict. c. 33, which applies to wills executed or republished after the 2nd August, 1877, contingent remainders are, "in the event of the particular estate determining before the contingent remainder vests," to take effect as executory limitations. See *ante*, p. 231.

An estate may  
be a remainder  
or an execu-  
tory devise,  
according to  
the events.

An estate may, according to the events that happen, be either a remainder or an executory devise. For instance, if after life estates there is a devise to children in fee, and if they die under twenty-one over, the devise over, if there are children to take who die under twenty-one, would be an executory devise; yet the implied devise over, in case there were no children to take at all, would be a contingent remainder. *Evers v. Challis*, 18 Q. B. 224; 7 H. L. 531; *Brookman v. Smith*, L. R. 6 Ex. 291, p. 305.

Remainder

A remainder must be distinguished from an immediate vested

estate, subject to a term; thus, where an estate of freehold is limited after a term, it is either a vested estate or an executory devise. For instance, a devise to A. for a term of eighty years, if he shall so long live, and after his death to B., gives B. strictly speaking an executory interest, since A. may live longer than eighty years, and the freehold would therefore be in suspense during the remainder of A.'s life. It has, however, been held that B. takes a vested interest, "for the mere possibility that a life in being may endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingency." *Fearne*, C. R. 21; *Napper v. Sanders*, Hutt. 118, cit. 3 At. 781; *Lord Derby's Case*, cit. Lit. Rep. 370; *Fearne*, C. R. 22.

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distinguished  
from an im-  
mediate vested  
estate subject  
to a term.

This applies, however, only "where the life cannot exceed the term, and the term must determine with the life." It does not apply, for instance, where the term is only for sixty years. *Beverley v. Beverley*, 2 Vern. 131.

In the same way a devise, after payment of debts, is not a remainder but an immediate vested interest. *Barnardiston v. Carter*, 1 P. W. 505; 3 B. P. C. 64; *Bagshaw v. Spencer*, 1 Ves. sen. 142; see 1 Coll. Jur. 378; and see *ib.* 214.

Devise after  
payment of  
debts is vested.

Again, dispositions by way of remainder may be intended to take effect only after the determination of prior partial interests, or they may be alternative contingent remainders intended to provide for the case of prior contingent limitations not taking effect. In the former case, if any of the intermediate limitations are void, the remainders fail with them; in the latter, the limitations are good if the events upon which they are to take effect happen. *Brudenell v. Elwes*, 1 East, 442; *Crompe v. Burrow*, 4 Ves. 681.

Remainders  
and alter-  
native con-  
tingent limita-  
tions.

Thus, in a devise to A. for life, then to his first son for life, and after his decease to the first and other sons of such first son successively in tail, and in default of issue of A., or in case of his not having any at his decease over, if A. has a son and grandson, the devise over in default of issue of A. is a disposition by way of remainder of something not previously disposed of; while the devise, in case of his not having any issue at his decease, is an alternative contingent limitation,

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disposing of something previously disposed of, in the event of that disposition failing in a particular way. *Monypenny v. Dering*, 2 D. M. & G. 145; *Doe v. Challis*, 18 Q. B. 224; 7 H. L. 531; *Percival v. Percival*, 9 Eq. 386.

And the same limitation may, according to the events that happen, be a disposition to take effect after the failure of prior limitations, or a substitutitional limitation intended to meet the case of prior limitations never taking effect at all. For instance, a limitation in default, or for want of persons to take under prior limitations for life or in tail, takes effect either in default of persons to take the prior estates, or after the determination of their estates. *Goodright v. Jones*, 4 Mau. & S. 88; *Lewis v. Waters*, 6 East, 336; see *Doe v. Dacre*, 1 B. & P. 250; 8 T. R. 112.

Whether a contingency runs through a whole series of limitations.

When a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, the contingency *primâ facie* applies to the whole series of limitations. *Davis v. Norton*, 2 P. W. 390; *Doe d. Watson v. Shipphard*, Dougl. 75; *Toldervy v. Colt*, 1 Y. & C. Ex. 240, 627; 1 M. & W. 250.

Similarly, when an interest is given to a person, and then in a certain event a different interest is given with limitations over, the contingency applies to all the subsequent limitations. *Gray v. Golding*, 6 Jur. N. S. 474; *Cattley v. Vincent*, 15 B. 198; *Findon v. Findon*, 24 B. 83; *Lett v. Randall*, 10 Sim. 112; *Paylor v. Pegg*, 24 B. 105.

Cases where the subsequent limitations are independent gifts.

On the other hand, if the subsequent limitations, or any of them, can be looked upon as independent gifts, they will not be liable to the contingency of preceding gifts. *Lethieullier v. Tracy*, 3 Atk. 774; Amb. 204; *Boosey v. Gardiner*, 5 D. M. & G. 122; *Doutty v. Laver*, 14 Jur. 188; *Partridge v. Foster*, 35 B. 545; *In re Blight*; *Blight v. Hartnoll*, 13 Ch. D. 858.

In the same way, if a particular gift is expressed to be made contingent from motives applicable to that gift only, subsequent gifts will not be contingent. *Horton v. Whittaker*, 1 T. R. 346.

Subsequent gifts subject

And if subsequent gifts can be read as given, subject to the prior limitations, they will not be liable to the contingencies of

prior gifts. *Sheffield v. Earl of Coventry*, 2 D. M. & G. 551; see *Pearson v. Rutter*, 3 D. M. & G. 398; 6 H. L. 61; *Hole v. Davies*, 34 B. 345; *ante* p. 379.

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to prior con-  
tingent gifts.  
Where the  
ultimate limi-  
tation sums  
up the prior  
contingencies.

In the same way, when there has been a gift in one event to one set of issue in fee, and upon another event to another set of issue in tail, a gift over in default of such issue may be construed as referring to a failure of all the prior limitations, and not merely as a remainder dependent upon the limitations to the second class of issue taking effect. *Doe d. Lees v. Ford*, 2 E. & B. 970.

As to whether in a devise of Whiteacre to A. and his issue, and then to B. and his issue, and of Blackacre to B. and his issue, and then to A. and his issue, and in default of issue of A. and B. over, the ultimate gift includes both estates, see *Gordon v. Gordon*, L. R. 5 H. L. 254; see, too, *Adshead v. Willets*, 29 B. 358.

Whether an  
ultimate limi-  
tation applies  
to the whole  
of property  
which has  
been given in  
two inde-  
pendent lines.

## DIVESTING.

A vested interest which is given over in certain events is divested, if those events happen, though the gift over may be void; or though the légatee to take under the gift over dies before the testator. *Doe d. Blomfield v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 6 W.R. 728; 27 L. J. Ch. 726; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Hurst v. Hurst*, 21 Ch. D. 278. In *Jackson v. Noble*, 2 Kee. 500, the question was, whether the event upon which the gift over was to take effect had happened, and it was held it had not, the period during which it was to take effect being limited to the lives of the persons to take under the gift over.

A gift which  
is given over  
in certain  
events is  
divested if  
those events  
happen.

But if the contingency of there being a person to take living at the time can be looked upon as part of the event upon which the gift over is to take effect, the original gift will remain if there is no such person. *Crozier v. Crozier*, 15 Eq. 282.

Upon this principle, under a gift to the testator's two sons and daughter in equal shares, with a gift over of the daughter's share, if she should die without issue, to the survivors or

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survivor of the sons, it was held that the daughter, having survived the sons, took absolutely. *Jones v. Davies*, 28 W. R. 455; see *Eaton v. Barker*, 2 Coll. 124.

Substitutional  
gifts to sur-  
vivors.

In the case of a substitutional gift to several persons, or to such of them as may survive the tenant for life, if none survive the tenant for life the original gift remains, whether the gift is vested or contingent. *Sturges v. Pearson*, 4 Mad. 411; *Wagstaff v. Crosbie*, 2 Coll. 746; *Re Saunders' Trust*, L. R. 1 Eq. 675.

It is indifferent whether the gift is in the simple form "to several or the survivors," or whether there is an express gift over in the event of any members of a class dying before the tenant for life to the survivors; in such a case, if none survive the tenant for life, the original gift remains. *Harrison v. Foreman*, 5 Ves. 207; *Cambridge v. Rous*, 25 B. 409; *Marriott v. Abell*, 7 Eq. 473.

Substitutional  
gifts to  
children.

Similarly the shares of parents given in the event of their dying before the tenant for life to their children, remain absolute if there are no children. *Smither v. Willock*, 9 Ves. 233; *Hodgson v. Smithson*, 21 B. 356; 8 D. M. & G. 604.

Distinction  
between a  
gift over in  
certain events  
of the whole  
and of a  
partial  
interest.

An important distinction must, however, be drawn between a gift over of the whole of a prior interest in certain events, and a gift over of a portion of the prior interest in certain events. In the latter case the prior interest is divested only so far as is necessary to give effect to the gift over.

Thus, if there is a devise in fee, followed by a gift over to another person for life if the devisee dies without issue, the devisee in that event, nevertheless, takes the fee, subject only to the life interest. *Gatenby v. Morgan*, 1 Q. B. D. 685.

### THE CONSTRUCTION OF GIFTS OVER.

Gifts over on  
two different  
events to  
different per-  
sons where  
both events  
happen.  
The exact  
event must  
happen in

When property is given over in one event to one person, and in another event to another, and both events occur simultaneously, the original gift is not divested. *Ormerod v. Riley*, 12 Jur. N. S. 112. See *Drennan v. Andrew*, 36 L. J. Ch. 1.

When there is a gift over upon a certain contingency, it will not take effect unless the exact contingency happens. Thus, if

there is a gift to A. with a gift over if he dies in the testator's lifetime, and A. dies simultaneously with the testator, the gift over does not take effect. *Wing v. Angrave*, 8 H. L. 183; *Elliott v. Smith*, 22 Ch. D. 236. Chap. XXXVI.  
order that a gift over may take effect.

There are here two distinct and independent events, in which the gift to A. will lapse, death in the testator's lifetime and death simultaneously with the testator, one of which the testator has contemplated and the other not. No doubt, it may be said, that the gift over might be read as equivalent to "if A. does not survive me to B.;" but this would be making a will for the testator, since the event that has happened does not include the event contemplated, and it cannot be said, that if the gift over was to have effect if A. died in the testator's lifetime, *à fortiori* it was to have effect if A. died simultaneously with the testator. The most that can be affirmed is that if the testator could be consulted he would probably say, that the gift over was to have effect equally in either event.

But where the events which happen include the events contemplated by the testator, so that it may be said, if the gift was to go over in the events mentioned, *à fortiori* it must have been meant to go over in the events that have happened, the gift over will take effect. This is the rule mentioned by Cicero as having been adopted in the case of *Curius v. Coponius*: "*M. Curium, qui hæres institutus esset ita, 'mortuo postumo filio,' cum filius non modo non mortuus, sed ne natus quidem esset, hæredem esse oportere.*" Pro. Cæc. 18. Cases where the events which happen include the events upon which the gift over is to take effect.

And the test of the applicability of the rule will be found in the possibility of putting the argument in its favour in the form of *non modo non—sed ne quidem*—if, for instance, property is given to A. if he fulfil certain conditions, and if he neglect to fulfil them to B., and A. dies in the testator's lifetime, the gift over to B. will take effect, although, strictly speaking, the testator never contemplated that the performance of the conditions annexed to the gift to A. might become impossible through A.'s death in his lifetime. The preceding estate being out of the way, in any mode whatever, the remainder takes effect; and the rule applies whether the gift is void in its inception or becomes void in its result. See *Jones v. Westcombe*, 1 Eq. Abr.

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245, pl. 10; *Gulliver v. Wickett*, 1 Wils. 105; *Avelyn v. Ward*, 1 Ves. sen. 420; *Meadows v. Parry*, 1 V. & B. 124; *Warren v. Rudall*, 4 K. & J. 603; 9 H. L. 420; *Brock v. Bradley*, 33 B. 670; *Davies v. Davies*, 30 W. R. 918.

The failure of the prior gift in these cases was not owing merely to the fact that the first taker did not survive the testator, as in the cases under the former head, but to that fact, *plus* the non-performance of the condition, since, if the first taker had survived the testator he would not have taken an indefeasible interest till the condition had been satisfied.

So a gift to several persons by name, with a gift over if they should die in the testator's lifetime, will take effect with regard to the shares of those who are dead at the date of the will. *Barnes v. Jennings*, L. R. 2 Eq. 448.

Construction  
of gifts over  
upon death of  
the legatee  
under a given  
age.

Case where  
the legatee  
dies before  
the testator  
under the  
given age.

If there is a gift to a person with a gift over in the event of his death in a particular manner, as for instance to A., and if he dies under twenty-one to B.:—

1. If A. dies under twenty-one, in the lifetime of the testator, the gift over takes effect. *Darrel v. Molesworth*, 2 Vern. 378; *Willing v. Baine*, 2 Eq. Ab. 545, pl. 22; 3 Pl. Wms. 115; *Humphreys v. Howes*, 1 R. & M. 639; *Re Green's Estate*, 1 Dr. & Sm. 68; *Rackham v. De la Mare*, 2 D. J. & S. 74. In this case the failure of the prior gift is due not to lapse merely, since if A. had survived the testator the gift to him would not have been indefeasible until he had attained twenty-one.

Where the  
legatee dies  
over the  
given age  
before the  
testator.

2. If A. dies over twenty-one in the testator's lifetime, the gift over does not take effect. *Williams v. Chitty*, 3 Ves. jun. 545; *Doo v. Brabant*, 3 B. C. C. 393; 4 T. R. 706; *Humberstone v. Stanton*, 1 V. & B. 385; *McCarthy v. McCarthy*, 3 L. R. Ir. 317.

In this case since A., if he had survived, would have taken an indefeasible interest, the failure of the gift to him is due to lapse only, which the testator cannot be supposed to have contemplated, and the event on which alone there is a bequest to the claimant has not occurred.

Where, however, the prior gift is to a class, the following rules may be laid down; suppose a gift to children as a class, followed by a gift over, if they die under twenty-one:—

1. If the contemplated class never comes into existence, the gift over takes effect on the principle already stated, *ante*: *Jones v. Westcomb*, 1 Eq. Ab. 245, pl. 10; *Mackinnon v. Sewell*, 2 M. & K. 202. In these cases the condition is more than fulfilled, since the events that have happened include the condition upon which the property is given over.

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Gift to class with gift over if all die under 21, where the class never comes into existence.

2. If members of the class come into existence, but die under twenty-one in the testator's lifetime. In this case, too, it seems the gift over will take effect, and the same arguments would apply as to the previous case, with the additional argument that the condition is in fact literally fulfilled. It is not by reason of lapse that the gift over takes effect, since if the legatees in question had survived the testator, the gift over would still have held good in the events that have happened. See *Brookman v. Smith*, L. R. 6 Ex. p. 303; *Mackinnon v. Peach*, 2 Kee. 555; but see *Greated v. Greated*, 26 B. 621.

If all die under 21 before the testator.

3. If members of the class come into existence, survive twenty-one, and die in the testator's lifetime, the gift over will not take effect: *Tarbuck v. Tarbuck*, 4 L. J. Ch. 129; *Brookman v. Smith*, L. R. 6 Ex. 291; *ib.* 7 Ex. 271; or, to state the rule more generally, if all conditions are fulfilled which would entitle those taking under the prior gift to indefeasible interests, supposing they had survived the testator, if in other words the failure of the prior gift is due to lapse and lapse only, the gift over does not take effect.

If all die before the testator, but not under 21.

#### GIFTS OVER UPON DEATH TREATED AS A CONTINGENT EVENT.

1. If there is an immediate gift to A., and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A.'s death before the testator. *Lord Bindon v. Earl of Suffolk*, 1 P. Wms. 96; *Turner v. Moor*, 6 Ves. 556; *Cambridge v. Rous*, 8 Ves. 12; *Crigan v. Baines*, 7 Sim. 40; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Ingham v. Ingham*, 1 R. 11 Eq. 101; *In re Neary's Estate*, 7 L. R. Ir. 311; *Elliott v. Smith*, 22 Ch. D. 236; see *Watson v. Watson*, 7 P. D. 10.

Gift over in case of the legatee's death.

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This rule applies though the gift over may be to persons "then living," or to survivors. *Trotter v. Williams*, Prec. Ch. 78; *King v. Taylor*, 5 Ves. 806.

So, too, a gift to several, with a gift over in case of the death of either in the lifetime of the others or other, was confined to death before the testator, the death of one before the other being a certain and not a contingent event. *Howard v. Howard*, 21 B. 550.

It makes no difference that the gift in case of A.'s death is to his children. *Slade v. Milner*, 4 Mad. 144; *Schenck v. Agnew*, 4 K. & J. 405.

And this construction has been adopted where the gift over was "in case of his decease or at his decease." *Arthur v. Hughes*, 4 B. 506.

Gift over at  
the legatee's  
death.

But, as a rule, when there is a gift to A. indefinitely, followed by a gift at his decease, A. will take only a life interest. *Constable v. Bull*, 3 De G. & S. 411; *Waters v. Waters*, 26 L. J. Ch. 624; *Adams' Trusts*, 14 W. R. 18; *Joslin v. Hammond*, 3 M. & K. 110; *Reid v. Reid*, 25 B. 469; *Bibbens v. Potter*, 10 Ch. D. 733; *Re Houghton*; *Houghton v. Brown*, 50 L. T. 529.

General in-  
tention that  
the gift was  
to take effect  
after A.'s  
death.

2. A gift over "in case of the death of A." has been construed as equivalent to "after his death" in the following cases:—

*a.* Where the gift is only of a life interest, and the remainder would otherwise be undisposed of. *Smart v. Clark*, 3 Russ. 365; *Tilson v. Jones*, 1 R. & M. 553; *Ingham v. Ingham*, 1 R. 11 Eq. 101.

*b.* Where the testator has given the absolute interest in another legacy in express terms, or has shown an intention to provide in all events for the person to take "in case of the death of A.," or has expressly provided for the death of the legatee in his lifetime with regard to another legacy to the same legatee, there is ground for arguing that the gift over in case of the death of A. was to take effect upon his death at any time. *Billings v. Sandom*, 1 B. C. C. 393; *Nowlan v. Nelligan*, 1 B. C. C. 489; *Douglas v. Chalmer*, 2 Ves. jun. 501.

*c.* So a direction in the event of A.'s death to *continue* her annuity for the benefit of her children will not be construed as providing only against lapse. *Wilkins v. Jodrell*, 13 Ch. D. 564.

3. If the gift is after a life estate, or a time is appointed for payment, the words "in case of death" refer to death at any time before the vesting in possession, whether before or after the testator. *Hervey v. M'Laughlin*, 1 Pr. 264; *Johnson v. Antrobus*, 21 B. 556; *Bolitho v. Hillyar*, 34 B. 180; and see *James v. Baker*, 8 Jur. 750.

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Gift over in case of the legatee's death after a life interest.

It appears that a gift after a life interest to executors for their trouble, with a gift over in case of death, would *prima facie* mean death before the testator. *Green v. Barrow*, 10 Ha. 459.

4. In the case of realty a devise to A. simply in a will before the Wills Act, and in case of his death over, would perhaps be construed as to A. for life, and after his death over. *Bowen v. Scowcroft*, 2 Y. & C. Ex. 640; see, however, *Wright v. Stephens*, 4 B. & Ald. 574.

Gift over of realty in case of the death of the devisee.

On the other hand, if the devise gives A. the fee, a gift over, in case of A.'s death, will be held to refer to his death before the testator. *Rogers v. Rogers*, 7 W. R. 541.

#### GIFTS OVER UPON DEATH COUPLED WITH A CONTINGENCY.

By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sec. 10, it is enacted that "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect."

Conveyancing Act, 1882, section 10.

The section applies where the executory limitation is contained in an instrument coming into operation after the 31st December, 1882. It will be noticed that the section is limited to land.

In cases where the Act does not apply the following rules are deducible from the cases :

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Gift over upon death without issue is not confined to death before the testator.

The fourth rule in *Edwards v. Edwards* is overruled.

In what cases the period of defeasibility will be limited.

Gift over to survivors.

If there is an immediate gift to A., and if he dies without issue over, the gift over takes effect upon the death of A. without issue at any time, whether before or after the testator. *Farthing v. Allen*, 2 Mad. 310; 2 Jarm. 783; *Smith v. Stewart*, 4 De G. & Sm. 253; *Cotton v. Cotton*, 23 L. J. Ch. 489; *Bowers v. Bowers*, 8 Eq. 283; 5 Ch. 244; *Else v. Else*, 13 Eq. 196; *Varley v. Winn*, 2 K. & J. 705.

Similarly, if the gift is future, as to A. for life and then to B., and if B. dies without issue over, the gift over will take effect upon the death of B. at any time without issue, whether before or after the tenant for life. *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, *ib.* 408; overruling the so-called fourth rule in *Edwards v. Edwards*, 15 B. 357.

And similarly, a direction to settle a legacy upon marriage is *prima facie* not restricted to marriage in the lifetime of a tenant for life. *Witham v. Witham*, 3 D. F. & J. 758; see *Davies v. Davies*, 50 L. J. Ch. 623, where the bequest was immediate and the direction restricted to a year from the death.

There may, however, be circumstances in the will limiting the defeasibility to some earlier time than the death of the legatee without issue. Some of the cases decided on the authority of *Edwards v. Edwards* are probably not reconcilable with the rule laid down in *Ingram v. Soutten*. See *Allen's Estate*, 3 Dr. 380.

The following rules seem, however, to be admitted in *O'Mahoney v. Burdett*.

1. Possibly, where there is a gift over if any members of a class die without issue to the survivors, the gift over must take effect, if at all, before the time when the survivors are to be ascertained.

Thus, if the gift is immediate the gift over may be limited to the happening of the event in the testator's lifetime. *In re Smaling*; *Johnson v. Smaling*, 26 W. R. 231; see *Apsey v. Apsey*, 36 L. T. N. S. 941; a case apparently inconsistent with *Bowers v. Bowers*.

If the gift is, after a life interest, to several and if any die without issue to the survivors, the gift over may in the same

way be limited to death without issue before the tenant for life. See *Clark v. Henry*, 11 Eq. 222; 6 Ch. 538; *Besant v. Cox*, 6 Ch. D. 604.

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2. If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of prior legatees without issue are contemplated as taking through the medium of the same trustees, there is *prima facie* reason for restricting the death without issue to death without issue before the period of distribution. *Galland v. Leonard*, 1 Sw. 161; *Wheable v. Withers*, 16 Sim. 505; *Edwards v. Edwards*, 15 B. 357; *Beckton v. Barton*, 27 B. 99; *Dean v. Handley*, 2 H. & M. 635; see *Smith v. Colman*, 25 B. 217; *In re Hayward*; *Creery v. Lingwood*, 19 Ch. D. 470; *In re Luddy*; *Peard v. Morton*, 25 Ch. D. 394.

Where the donees to take upon death without issue of a prior legatee are contemplated as taking through the medium of a trust which determines at a certain time.

But words directing payment or distribution at a certain time will not confine the contingency to that time, if the persons to take upon the death without issue of a prior legatee are not treated as taking through the medium of the same payment or distribution. *Gosling v. Townshend*, 17 B. 245; 2 W. R. 23.

3. And if there are no trustees, but payment or division is directed at the death of the tenant for life, and all the subsequent dispositions are made with reference to the same payment or division, the death without issue will be confined to such death before the period of distribution. *Olivant v. Wright*, 1 Ch. D. 346; *Re Thompson to Curzon*, 52 L. T. 498; see *Re Anstice*, 23 B. 135; *Pearman v. Pearman*, 33 B. 394.

When all the dispositions of the testator have reference to the period of distribution.

So, if there is a life tenancy and then a gift to a class to be paid when they respectively attain twenty-one, and if any die without issue to the survivors, to be paid at the same time as the original share, death without issue will be limited to such death under twenty-one. *Re Johnson's Trusts*, 10 L. T. N. S. 455; *Re Hayne's Trusts*, 18 L. T. N. S. 16.

Similarly, if the gift is to A. if living at the death of the tenant for life, and if not, to his children, and if he dies without children over, the ultimate gift over is confined to the lifetime of the tenant for life. *Andrews v. Lord*, 8 W. R.

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405; see *Wood v. Wood*, 35 B. 587; *In re Hill's Trusts*, 12 Eq. 302.

When the legatee is to have the absolute control at a certain time.

4. When there is a direction that a legatee is to have the absolute control of her legacy at a particular time, a subsequent gift over will be limited to take effect before that time. *Clark v. Henry*, 11 Eq. 222; 6 Ch. 588.

When gifts over subsequent to the gift over upon death without issue are expressly limited within a certain time.

5. If there is a gift over upon death without issue before a given time of all the legatees whose shares have previously been given over upon death leaving issue indefinitely, or if the gift to the persons who are to take upon death of the prior legatees without issue is again given over upon the death of such persons before a certain time, there is a strong argument for restraining the prior gifts over to death of the prior legatees without issue before the same time. *Re Hayes' Will*, 9 Jur. N. S. 1068; *Re Sarjeant*, 11 W. R. 203; *Da Costa v. Keir*, 3 Russ. 360; see *Doe d. Lifford v. Sparrow*, 13 East, 359; *Lloyd v. Davies*, 15 C. B. 76.

Gifts over in several events, one of which must happen, after prior gift with words of limitation or benefit.

6. If the gift is followed by words of limitation or benefit, as "to A., his heirs, and assigns," or "to A. for ever," or "to A. for his own use and benefit," and the property is then given over upon contingencies, one or other of which must happen; as, for instance, upon death either with or without children, the defeasibility will be limited by the period of distribution, whether it is the testator's death or some other time, in order not to cut down the previous absolute interests to life interests merely. *Doe v. Sparrow*, 13 East, 359; *Clayton v. Lowe*, 5 B. & Ald. 636; *Gee v. Corporation of Manchester*, 17 Q. B. 737; *Woodburne v. Woodburne*, 23 L. J. Ch. 336; *Da Costa v. Keir*, 3 Russ. 360; *Slaney v. Slaney*, 33 B. 631.

If, however, the gift is merely in general words without any express indication that it is intended to be absolute, the fact that the contingencies upon which the property is given over in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. *Gosling v. Townshend*, 2 W. R. 23; *Cooper v. Cooper*, 1 K. & J. 658; *Bowers v. Bowers*, 8 Eq. 283; 5 Ch. 244.

General in-

7. It is not, however, necessary in order to limit the defeasi-

bility that the gifts over should be upon contingencies, one or other of which must occur, so as to cut down the prior interest to a life estate, unless the defeasibility is limited.

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tention to  
give the  
legatees in-  
defeasible  
interests at a  
certain time.

In *Clayton v. Lowe*, *Gee v. Mayor of Manchester*, and *Woodburne v. Woodburne*, *supra*, the interest of the surviving legatee would not necessarily have been reduced to a life estate, and if it is once clear that the legatee is to take an absolute interest, a gift over in one event is as inconsistent with that absolute interest as a gift over in several, one of which must occur.

And accordingly, where the intention to give indefeasible interests at a particular time is clear, the gift over upon a single contingency, as upon death without issue, will be limited to death without issue before that time. *Brotherton v. Burry*, 18 B. 65; *Ware v. Watson*, 7 D. M. & G. 248; *Re Anstice*, 23 B. 135; *Clark v. Henry*, 11 Eq. 222; 6 Ch. 588; perhaps *Barker v. Cocks*, 6 B. 82, and *Davenport v. Bishopp*, 2 Y. & C. C. 463, come under this head.

8. If the gift is contingent, as to A. at twenty-one, there is some reason for restricting a gift over upon death coupled with a contingency to such death under twenty-one.

Gift over  
upon death  
leaving  
children after  
a contingent  
gift.

It seems clear that this construction would be adopted if the gift over is upon the death of A. leaving children to his children, in order to provide for the children of A., if he dies under twenty-one leaving children. *Home v. Pillans*, 2 M. & K. 15.

It seems the same would be the case if the person to take under the gift is the widow of the legatee. *Randfield v. Randfield*, 8 H. L. 225.

The gift over upon death without issue cannot, however, be restricted to the time of vesting, where there is an express gift over upon death merely, before the time of vesting. *Martineau v. Rogers*, 8 D. M. & G. 328.

Whether the defeasibility would be limited where the gift over is to strangers is more doubtful. See *Andrews v. Lord*, 6 Jur. N. S. 865; and see *Dowling's Trusts*, 14 Eq. 463; *Smith v. Spencer*, 6 D. M. & G. 631.

9. If what is given over is the share the legatee would have

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share legatees  
would have  
taken.

Ultimate gift  
over upon  
death without  
issue re-  
stricted by  
prior gift.

Gift over  
upon marriage  
without con-  
sent confined  
to marriage  
under 21.

taken, this confines the gift over to the testator's lifetime. *In re Hayward*; *Creery v. Lingwood*, 19 Ch. D. 470.

10. Where there is a gift to two persons, and if either dies under twenty-one without issue to the survivor, and if both die without issue over, the defeasibility will be restricted to the age of twenty-one. *Kirkpatrick v. Kilpatrick*, 13 Ves. 476; *Thackeray v. Hampson*, 2 S. & St. 214; see *Else v. Else*, 13 Eq. 196.

11. When there is a gift at twenty-one, or upon marriage with consent, a gift over upon marriage without consent has been confined to the age of twenty-one. *Desbody v. Boyville*, 2 P. Wms. 547; *Knapp v. Noyes*, Amb. 662; *Osborn v. Brown*, 5 Ves. 527; *West v. West*, 4 Giff. 198; *Duggan v. Kelly*, 10 Ir. Eq. 473.

12. It may be noticed that where there is a gift to several, and in case of the death of any to the survivors, and if they die without children over, the gift, in case of death, will not be extended to mean death at any time, nor will the gift upon death without children be confined to such death in the lifetime of the testator. *Clarke v. Lubbock*, 1 Y. & C. C. 492; *Child v. Giblett*, 3 M. & K. 71.

## CHAPTER XXXVII.

## SUBSTITUTION.

EVERY executory limitation intended to destroy prior interests in certain contingencies is in the widest sense substitutional. Chap.  
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The term is, however, generally applied to limitations intended to provide for the death of prior legatees before the period of distribution. Substitution  
defined.

The simplest form of substitutional gift, introduced by the word "or," as for instance, to class A. or class B., generally involves the relation of greater to smaller class, or of ancestor to descendant.

It is, however, probable that a simple gift to A. or B. would now be considered substitutional. See *Carey v. Carey*, 6 Ir. Ch. 255; see, however, *Longmore v. Broome*, 7 Ves. 128; *Miller v. Chapman*, 24 L. J. Ch. 409; *Maude v. Maude*, 22 B. 290. Whether a  
gift to A. or  
B. is substitu-  
tional.

But a gift to A. or B., or to A. or his children, as C. may appoint, is not substitutional, and in default of appointment it goes among all the appointees equally. *Penny v. Turner*, 2 Ph. 493; *White's Trusts*, Joh. 656. Gift to A. or  
B., as C. may  
appoint, is not  
substitutional.

A gift of £100 a-piece to each of the children, grandchildren, or other descendants of A., includes all the descendants. *Solly v. Solly*, 5 Jur. N. S. 36.

When the contingency of surviving the period of distribution is applied both to the original and substituted class; if, for instance, the gift is to parents or their children living at the decease of the tenant for life, the gift will nevertheless be construed as substitutional. *Congreve v. Palmer*, 16 B. 435; *Atkinson v. Bartrum*, 28 B. 219. Contingency  
of surviving  
the period of  
distribution  
applied to  
original and  
substituted  
legatees.

In such a case, however, if there is anything to show that the "Or"

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changed into  
"and."

original and substituted class are to take co-ordinately, "or" will be read "and." *Richardson v. Spraag*, 1 P. Wms. 433, where the gift was to such of the testatrix's daughters, or daughters' children, as should be living at her son's death, "without considering any superiority or eldership whatever." See *Shand v. Kidd*, 19 B. 310; *In re Cleland's Trusts*, 7 L. R. Ir. 74.

And where the direction was to pay a sum of money after the death of a tenant for life, "to all and every the testatrix's nephews and nieces, to wit, A. or her children, B. or her children," etc., to be equally divided between them, "or" was read "and;" the words under the videlicet being only an expanded description of the persons to take. *Eccard v. Brooke*, 2 Cox, 213.

So, too, where the gift is to such of several persons as should be living at the testatrix's decease, or the issue of such of them as should be married, "or" will be read "and." *Horridge v. Ferguson*, Jac. 583.

Gifts to  
persons  
"then" living,  
or their issue.

Upon the same principle, a gift to children living at the period of distribution, or *their* issue, will be construed as a gift to children then living, and the issue of those then dead, including issue of those dead at the date of the will, but not, it would seem, of those who were dead before the testator was born. *King v. Cleveland*, 4 De G. & J. 477; *Philp's Will*, 7 Eq. 151; *Burt v. Hillyar*, 14 Eq. 160; *Wingfield v. Wingfield*, 9 Ch. D. 658; *Keay v. Boulton*, 25 Ch. D. 212.

Substitution  
distinguished  
from gift over  
to take place  
at any time.

A substitutional gift, substituting one set of legatees for others dying before the period of distribution, must be distinguished from an executory gift over intended to take effect at any time. Thus, a gift to children living at a particular time, with a gift over, if any *such* children die leaving issue to their issue, is an executory limitation to take effect at any time. *La Roche v. Davies*, 3 Y. & C. Ex. 612, n.; *Ex parte Hunter*, 3 Y. & C. Ex. 610; *Howes v. Herring*, 1 M'Cl. & Y. 295.

On the other hand, if the gift is to children living at the period of distribution, with a gift to their issue if any such children die before becoming entitled, the gift to the issue will be construed as substitutional, since children, living at the period of distribution, could not die without becoming

entitled. *Jeyes v. Savage*, 10 Ch. 555; see *Giles v. Giles*, 8 Sim. 360.

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A substitutional gift must further be distinguished from those cases where after an absolute gift to a class the shares of females, members of the class, are directed to be settled for life, with remainder to children. In the latter case the gift may possibly fail by the death of the donee before the testator. *Stewart v. Jones*, 3 De G. & J. 532; *In re Speakman*; *Unsworth v. Speakman*, 4 Ch. D. 620; *In re Roberts*; *Tarleton v. Bruton*, 27 Ch. D. 346.

Substitution distinguished from an absolute gift with a direction to settle.

On the other hand, a substitutional gift will take effect, though the original donee dies before the testator.

Thus a direct gift to A. or his children goes to A. if he survives the testator, and to his children if he does not. *Montagu v. Nucella*, 1 Russ. 165; *Salisbury v. Petty*, 3 Ha. 86; *Whitcher v. Penley*, 9 B. 477.

Direct gift to A. or his children.

Similarly, if there is a life interest, and then a gift to A. or his children, the substitutional gift takes effect whether A. dies in the lifetime of the testator or the tenant for life. *Girdlestone v. Doe*, 2 Sim. 225; *Porter's Trusts*, 4 K. & J. 188; *Habergham v. Ridehalgh*, 9 Eq. 395; *Hobgen v. Neale*, 11 Eq. 48; see *In re Dawes' Trusts*, 4 Ch. D. 210.

Future gift to A. or his children.

As to the effect of the death of some of the original legatees before the testator:

It is settled that where the gift is to a class of parents, with a substitutional gift to the children of parents dying before the period of distribution, children of parents who die after the date of the will, and before the testator, will take. *Smith v. Smith*, 8 Sim. 353; *Jones v. Frewin*, 12 W. R. 369; 5 N. R. 415; *Re Hotchkiss's Trusts*, 8 Eq. 643; *Habergham v. Ridehalgh*, 9 Eq. 395.

Whether substituted legatees can take for original legatees who die before the testator's death.

Though, of course, if the original gift is to a class living at the testator's death, or at some other period, and the substitutional gift is expressly confined to the children of such persons, the substitution can have no effect with regard to those who never become members of the original class. See *Shergold v. Bone*, 13 Ves. 370; *Smith v. Farr*, 3 Y. & C. Ex. 328.

Case where the original class is confined to persons living at the testator's death.

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Whether there can be substitution in respect of legatees dead at the date of the will :

Where the original gift is to named persons.

1. When there is a gift to several persons *nominatim*, with a substitution of their issue in the event of their death, the fact that one of the persons so named is dead at the date of the will will not prevent his issue from taking. *Hannam v. Simms*, 2 De G. & J. 151; *Ive v. King*, 16 B. 46; *Hobgen v. Neale*, 11 Eq. 48; see *Barnes v. Jennings*, L. R. 2 Eq. 448.

Where the original gift is to a class.

2. If, however, the original gift is to a class, with a substitutional gift to issue, the question is whether the issue take a share which has been given to a parent who is contemplated as capable of taking under the will, or whether they take a share which has not been previously given to their parent. In the former case, issue of parents dead at the date of the will will not take, in the latter they will.

The important point is not whether the gift itself is substitutional, but whether the interests of persons who are contemplated as capable of taking under the will are given in the event of their death to substituted legatees.

When the substituted legatees take original shares.

Thus, though a gift to such of a class as may be then living, or the issue of any then dead, is strictly substitutional, the issue, if they take at all, take original shares, since nothing is given to parents then dead. *Attwood v. Alford*, L. R. 2 Eq. 479.

In the same way a gift to parents "then living," and the issue of those then dead, is a direct substantive gift to the issue. *Smith v. Smith*, 5 Ch. 342; *Martin v. Holgate*, L. R. 1 H. L. 175; see *Ashling v. Knowles*, 3 Dr. 593; *Etches v. Etches*, 3 Dr. 447.

Gift to parents then living, and the issue of those then dead.

a. If the gift is to parents and issue in one continuous sentence—as, for instance, to children then living, and the issue of those then dead—the issue of parents deceased at the date of the will take, though the issue may be directed to take only a parent's share, as this direction will be satisfied by a distribution *per stirpes*. *Tytherleigh v. Harbin*, 6 Sim. 329; *Rust v. Baker*, 8 Sim. 443; *Bebb v. Beckwith*, 2 B. 308; *Coulthurst v. Carter*, 15 B. 421; *Faulding's Trusts*, 26 B. 263; *Philp's Will*, 7 Eq. 151; *Heasman v. Pearse*, 7 Ch. 275.

It seems the issue of a parent who died before the testator was born would not take. *Wingfield v. Wingfield*, 9 Ch. D. 658.

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If the gift is to my children then living, and the children of such of my *said* children as shall be then dead, the testator by using the term "said" children shows that he is contemplating a class of children living at the date of the will, and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted. *Re Thompson's Trust*, 2 W. R. 218; 5 D. M. & G. 280; see *Peel v. Catlow*, 9 Sim. 372; *Smith v. Pepper*, 27 B. 86; *Hall v. Woolley*, 39 L. J. Ch. 106.

Effect of the  
word "said."

On the other hand, if the gift is to brothers and sisters living at a particular time, and the children of such of the said brothers and sisters as should have died, and the testator has only one brother living at the date of the will, he cannot be referring to a class existing at the date of the will, and children of brothers and sisters dead at the date of the will will be admitted. *Re Jordan's Trust*, 2 N. R. 57; *Giles v. Giles*, 8 Sim. 360; see *Jarvis v. Pond*, 9 Sim. 549.

If the children are expressed to be the children of parents who are beneficiaries under the will; if, for instance, the bequest is to "my daughters and their children," the children of a daughter dead at the date of the will take nothing. *Parker v. Tootal*, 11 H. L. 143; see *Crook v. Whitley*, 26 L. J. Ch. 350; but see *Clay v. Pennington*, 7 Sim. 370.

Gift to my  
daughters and  
their children.

b. When the gift is clearly substitutional, as in the case of a gift to a class or their issue, issue of members of the class dead at the date of the will will not take. *Congreve v. Palmer*, 16 B. 435; *In re Webster's Estate*; *Widgen v. Mello*, 23 Ch. D. 737. The principle seems to have been admitted in *In re Sibley's Trusts*, 5 Ch. D. 494.

When the  
gift is sub-  
stitutional in  
the simplest  
form.

If there is anything to assist the construction, issue of members of the class dead at the date of the will may be let in. Thus, if none of the members of the original class are alive at the date of the will, or if the original class is brothers and sisters, and the testator has only one brother living at the date of the will, children of those then dead will come in. *Gowling v. Thompson*,

Where such of  
the original  
legatees as are  
alive at the  
date of the  
will do not  
satisfy the  
words of gift.

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Gift to the substituted legatees in an independent sentence.

Direction that the legacy of a parent should go to his children.

Issue to stand in the place of their parents.

Issue to take the share their parents would have been entitled to if living.

11 Eq. 366; see *Barnaby v. Tassell*, 11 Eq. 363; *Jarvis v. Pond*, 9 Sim. 549; *In re Sibley's Trusts*, 5 Ch. D. 494.

c. Where the gift to the issue is in an independent clause, the question is whether the intention is to add fresh members to or substitute them for the original class.

If the gift is to children living at the testator's death, with a direction that if any should happen to die in his lifetime, the "legacy" intended for such child should be for his issue, the word legacy shows that the testator meant to substitute only issue of parents who at the date of the will were capable of taking. *Christopherson v. Naylor*, 1 Mer. 320; *Hunter v. Cheshire*, 8 Ch. 751. It may be doubted whether *Phillips v. Phillips*, 13 W. R. 170; 10 Jur. N. S. 1173; and *Parsons v. Gulliford*, 10 Jur. N. S. 231, can stand with these authorities.

The same rule applies if there is no direct gift to issue, but only a direction that issue of parents dying are to stand in the place of their parents, or to take their parents' share. *Butler v. Ommaney*, 4 Russ. 71; *Gray v. Garman*, 2 Ha. 268; *Atkinson v. Atkinson*, 1 R. 6 Eq. 184; *Re Hotchkiss's Trusts*, 8 Eq. 643; *Habergham v. Ridehalgh*, 9 Eq. 395; *Kelsey v. Ellis*, 38 L. T. N. S. 471; *In re Barker*; *Asquith v. Saville*, 47 L. T. 38.

Where the gift was to such of the children of the testator's sisters as should survive the tenant for life, followed by a direction that in case any of such children should be dead at the testator's decease leaving issue, such issue should take the share of their deceased parent, the issue of a child dead at the date of the will was not included. *West v. Orr*, 8 Ch. D. 60; see *Giles v. Giles*, 8 Sim. 360.

On the other hand, if the original gift is to a class, with a direction, that the issue of any dying in the testator's lifetime, or before the period of distribution, should take the share their parents would have been entitled to if then living, the issue of those dead at the date of the will will be admitted, as the direction amounts to an independent gift, the word share being satisfied by a distribution *per stirpes*. *Loring v. Thomas*, 1 Dr. & S. 497; *Chapman's Will*, 32 B. 382; *Adams v. Adams*, 14 Eq. 246; *In re Lucas' Will*, 17 Ch. D. 788.

This rule has been applied where the original gift was to a class living at the death of the tenant for life. *In re Woolrich; Harris v. Harris*, 48 L. J. Ch. 321.

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In these cases it is not the share of the parents, or the share the parents are entitled to, which is given to the issue, but the share the parents would have been entitled to. *In re Potter's Trusts*, 8 Eq. 52, is a more difficult case, since there the gift was to nephews and nieces, and in case of the death of any of his *said* nephews and nieces leaving issue, such issue to take the share their parents would have taken if living, the word *said* showing that the testator referred to nephews and nieces capable of taking under the will. See *Re Thompson's Trust*, 2 W. R. 218; 5 D. M. & G. 280.

Perhaps issue of parents dead at the date of the will would not be admitted where other express provision is made for such issue. *Waugh v. Waugh*, 2 M. & K. 41.

Whether the contingency of the original gift attaches to the substituted gift:

When there is a life interest followed by a contingent gift to certain persons, and a gift if they die before the contingency to their children, the contingency attaching to the gift to the parents does not attach to that to the children, and the children take vested interests, although they may not survive the contingency upon which the gift to the parents was to take effect. For instance, if the bequest is to A. for life, then to such of my nephews as may be then living, and the children of such as may be then dead, the children take vested interests upon their parents' death, whether they survive A. or not.

Contingency attaching to original legatees does not attach to substituted legatees.

1. This is clearly settled if the children take original shares. *Martin v. Holgate*, L. R. 1 H. L. 175; *Re Orton's Trust*, 3 Eq. 375; *Burt v. Hillyar*, 14 Eq. 160.

Where the substituted legatees take original shares.

2. But if the gift to the children is substitutional there appears to be some difficulty. On the whole, the current of recent authority seems to be in favour of the same rule in the case of substitutional as of original gifts. *Masters v. Scales*, 13 B. 60; *Re Turner*, 34 L. J. Ch. 660; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *Merrick's Trusts*, L. R. 1 Eq. 551.

Whether rule is the same with substitutional gifts.

But a difficulty is created by the case of *Pearson v. Stephen*

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in the House of Lords, 5 Bl. N. S. 203. There there was a gift to S. during coverture, and upon the death of her husband in her life to her absolutely, but if her husband should survive her, then to the testator's five sons and their respective issue *per stirpes* and not *per capita*; and it was held that in the event of S. dying in her husband's life, the sons of the testator living at such event would be absolutely entitled, but if any of the sons should die in the lifetime of S. leaving issue, such issue, if living at the death of S., would be entitled to the share their parents would have taken; but see the remarks of Kindersley, V.-C., on this case in *Lanphier v. Buck*, 34 L. J. Ch. 659.

Substituted legatees in order to take must survive their ancestor.

3. There is, however, this difference between a substitutional and original gift to the children, that in the former case only those children who survive the parents will take, while in the latter all the children will take, whether they survive the parents or not; but see *Humfrey v. Humfrey*, 2 Dr. & Sm. 129. "The substitution takes place at the death of the nephew or niece. And then I see very good ground for saying there by reason of its being substitution, you will not substitute dead people for the nephew or niece who has been living up to that time and has then just died." *Lanphier v. Buck*, 2 Dr. & Sm. 484; 34 L. J. Ch. 657; *Re Turner*, 34 L. J. Ch. 660; *Merrick's Trusts*, L. R. 1 Eq. 551; *Thompson v. Clive*, 23 B. 282; *Crause v. Cooper*, 1 J. & H. 207; *Bennett's Trusts*, 3 K. & J. 280; *Hurry v. Hurry*, 10 Eq. 346; *Hobgen v. Neale*, 11 Eq. 48; *Heasman v. Pearse*, 11 Eq. 522; 7 Ch. 275; *In re Haskett Smith's Trusts*, 26 W. R. 418.

Upon a similar principle, under a gift in certain events to a class and the issue of such of them as shall then be dead, members of the class dying without issue before the events happen take a share. *In re Wood*; *Moore v. Bailey*, 29 W. R. 171.

Whether the original and substituted class are mutually exclusive:

Whether original and substituted legatees can take together.

When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can

take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class. Chap.  
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It is clear that if all the original class survive the period of distribution, they alone take. *Sparks v. Restal*, 24 B. 218; *Margetson v. Hall*, 10 Jur. N. S. 89; 12 W. R. 334. Where all the original legatees survive.

So, if none of the original class survive the period of distribution, the substituted legatees alone take. *Willis v. Plaskett*, 4 B. 208; *Timms v. Stackhouse*, 27 B. 434; *Bolitho v. Hillyar*, 34 B. 150; *Attwood v. Alford*, L. R. 2 Eq. 479. Where none of the original legatees survive.

But if some of the original class die leaving children and others survive the period of distribution : Where some original legatees die.

If the gift is to several persons *nominatim* as tenants in common or their children, those who survive the period of distribution take, together with the children of those who die before it. *Price v. Lockley*, 6 B. 180.

In the same way, in the case of a simple substitutional gift to children or their issue to be divided amongst them in equal shares, the issue of a child dying after the testator and before the period of distribution take with the other children, *Finlason v. Tatlock*, 9 Eq. 258; *Neilson v. Monro*, 27 W. R. 936; *In re Sibley's Trusts*, 5 Ch. D. 494; see *Holland v. Wood*, 11 Eq. 91.

How the class of substituted legatees is to be ascertained, when the gift is to A. for life, then to B. or his issue :— When the class of substituted legatees is to be ascertained.

1. If B. dies in the testator's lifetime, the class is ascertained at the testator's death. *Ive v. King*, 16 B. 46.
2. If B. survives the testator and dies in the lifetime of the tenant for life, the class is ascertained at B.'s death. *Ive v. King*, 16 B. 46; *Hobgen v. Neale*, 11 Eq. 48.

But the class is not to be definitely ascertained at those periods, but will open to let in issue born afterwards and before the period of distribution. *In re Sibley's Trusts*, 5 Ch. D. 494; *In Re Jones' Estate*, 47 L. J. Ch. 775, overruling on this point *Hobgen v. Neale*, *supra*. See *ante*, p. 246.

## CHAPTER XXXVIII.

## GIFTS TO SURVIVORS.

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Survivor used  
as a word of  
limitation of  
an estate.

THE word survivor may be either a word of limitation of an estate, denoting the interest certain persons are to take, or it may denote a class of persons.

For instance, in a devise to A., B., and C. as tenants in common for life, with benefit of survivorship, the word survivorship refers to the extent of the estate and not to the class of persons, and upon the death of one the remaining tenants in common take the whole estate. *Haddelsey v. Adams*, 22 B. 266; *Taafe v. Conmee*, 10 H. L. 64.

The word cannot, of course, be a word of limitation where absolute interests are given. *Maberley v. Strode*, 3 Ves. 450; *Foley v. Gallagher*, 2 L. R. Ir. 389.

Meaning of  
survivor.

The word is, however, more usually employed to denote the persons who are to take, and in such cases it must have its natural meaning, which is to outlive; that is to say, to be alive at and after the time of a particular event or death of a particular person, which event or person the other is to survive. *Gee v. Liddell*, L. R. 2 Eq. 341. See, however, *Re Clark's Estate*, 3 D. J. & S. 111, where "survive" was held to mean merely "live after."

It has been held that a divesting clause in favour of survivors will operate in favour of a single survivor. *Hearn v. Baker*, 2 K. & J. 383; *Bowyer v. Currall*, 2 W. R. 328; *Bowyer v. Douglass*, W. N. 1876, 279.

## WHERE SURVIVORS WILL BE READ OTHERS.

Gift to

1. If there is an absolute gift to several persons, with a gift

to the survivors, if any die without issue, survivors must be construed in its ordinary sense. *Crowder v. Stone*, 3 Russ. 217; *Ranelagh v. Ranelagh*, 2 M. & K. 441; *Stead v. Platt*, 18 B. 50; *Greenwood v. Percy*, 26 B. 572.

2. Where there is a gift over to take place only in case the event on which the property is limited to the first legatees, among whom there is to be survivorship, happens in respect of all the legatees, survivor will be construed other, so as not to cause an intestacy. For instance, if the bequests are to A., B., and C., payable at twenty-one, and if either die under twenty-one, his share to the survivors, and if two die under twenty-one, the whole to the survivor, and if all die under twenty-one, then over, the share of one dying under twenty-one would go to one who had predeceased him but attained twenty-one and to the survivor equally. *Wilmot v. Wilmot*, 8 Ves. 10; *In re Jackson's Trust*, 14 Ir. Ch. 472. The same construction was adopted in *In re Connellan's Trust*, 16 Ir. Ch. 524, though there was no gift over, but *quære*.

In these cases the testator intends the property to go over as a whole, or not at all. As the whole cannot go over where the event does not happen in respect of all the first legatees, there is no other disposition of the shares in respect of which it happens except among the first legatees themselves, and, in order to allow them to take, the word survivor must be read other.

3. Where there is a devise to sons and the heirs of their bodies, and if any die without issue to the survivors and the heirs of their bodies, and if all die without issue over, survivorship will be referred to the *stirpes* and not to the first takers, and the share of a son dying without issue will go among the issue of a son previously deceased and the surviving sons. *Doe v. Waineright*, 5 T. R. 427; *Smith v. Osborne*, 6 H. L. 376.

In such cases the testator has expressed his intention of benefiting the line of issue, and the survivorship contemplated is one between the respective *stirpes* and not between the first takers merely, and this, coupled with the gift over, which can only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor.

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several, and if any die without issue, to the survivors.

Gifts to be paid at 21, with a gift over if all die under 21.

Survivorship between tenants in tail referred to the *stirpes*.

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Gift over is  
not material.

It is immaterial whether the word is survivors or such as survive. *In re Tharp's Estate*, 1 D. J. & S. 453.

And the same construction will be adopted even if there is no gift over to interpret the testator's intention. *Harman v. Dickenson*, 1 B. C. C. 91, see 34 B. 352; *Williams v. James*, 20 W. R. 1010; *Tufnell v. Borrell*, 20 Eq. 194.

Gifts for life  
remainder to  
issue, and if  
any die with-  
out issue, to  
the survivors  
for life, and  
then to their  
issue.

4. The same will be the case where the will gives life estates with limitations expressly to issue, followed by a gift on failure of issue of any of the tenants for life to the surviving tenants for life for their lives and then to their issue, and an ultimate gift over on failure of issue of all the tenants for life; and it makes no difference whether the gift be to survivors for life and then to their issue, or to survivors in like manner as the original shares were given. *Lowe v. Land*, 1 Jur. 377; *In re Keep's Will*, 32 B. 122; *In re Tharp's Estate*, 1 D. J. & S. 453; *Holland v. Allsop*, 29 B. 498; *Hurry v. Morgan*, L. R. 3 Eq. 152; *Badger v. Gregory*, 8 Eq. 78; *Waite v. Littlewood*, 8 Ch. 70; *In re Palmer's Trusts*, 19 Eq. 320; *Wake v. Varah*, 2 Ch. D. 348; *In re Row's Estate*, 43 L. J. Ch. 347.

There is here the same evidence of intention to benefit the issue, and the gift over shows that survivorship is contemplated, not merely between the first takers, but between the respective *stirpes*.

Whether  
gift over  
necessary.

5. It is the gift over which "supplies the necessary clue." *Wake v. Varah*, 2 Ch. D. p. 355.

In *Wake v. Varah* the attention of the Court was not called to the cases in which a gift over has been held to be immaterial. *Hodge v. Foote*, 34 B. 349; *Re Beck's Trusts*, 16 W. R. 189; 37 L. J. Ch. 233; *In re Arnold's Trusts*, 10 Eq. 252; followed in *In re Walker*; *Church v. Tyacke*, 12 Ch. D. 205.

But it must now be taken to be settled that in the cases above mentioned survivors is not to be read others unless there is a gift over or some other sufficient evidence of intention to assist the construction. *Wake v. Varah*, *supra*; *Beckwith v. Beckwith*, 46 L. J. Ch. 97; *In re Horner's Estate*; *Pomfret v. Graham*, 19 Ch. D. 186; *In re Dunlevy's Trusts*, 9 L. R. Ir. 349; *In re Benn*; *Benn v. Benn*, 29 Ch. D. 839.

*Re Corbett's Trusts*, Johns, 591, may be supported on the

ground that the testator expressly provided for the surviving issue of the children of the tenants for life, thus excluding an intention of also providing for children of tenants for life dying before the period of accruer, besides which the case was one in which absolute gifts were subsequently cut down by settlement.

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In *Beckwith v. Beckwith* the gift was to "other daughters surviving," so that to give surviving the meaning other would in effect have been to reject the word entirely.

"Others surviving."

If accruing shares are given to the survivors or survivor for their joint lives, and after the decease of the survivor to the children of the survivors or survivor, the surviving tenant for life will take the whole for life, though probably the children of predeceasing tenants for life would take on his death. *Winter-ton v. Crawford*, 1 R. & M. 407.

Effect of gift over after the death of the survivor.

6. If the gift to survivors is not given in the same manner as the original shares, there is no evidence that survivorship by stocks was intended, and the word will be construed strictly.

When the gift to survivors is not subject to the same limitations as the original gift.

Thus, where the prior limitations being for life with remainder to children, the gift is to survivors absolutely, and not to survivors for life, and then to their children, although there is a gift over of the whole upon death of all without issue, the intention to benefit the lines of issue is not sufficiently indicated, and survivors will be construed strictly. *Twist v. Herbert*, 28 L. T. N. S. 489.

Survivors must, *a fortiori*, be strictly construed where there is no gift over. *Leeming v. Sherratt*, 2 Ha. 14; *Lee v. Stone*, 1 Ex. 674; *Re Corbett's Trusts*, Johns. 591 (the residuary gift); *Browne v. Rainsford*, 1 R. 1 Eq. 384.

In such a case, however, there may be a general intention expressed to benefit the *stirpes* and not merely the surviving parents; for instance by a preliminary statement of intention that the property in question is to be divided among the children of several parents, without any mention of survivorship between the parents. *Hawkins v. Hamerton*, 16 Sim. 410.

General intention to benefit stirpes.

7. It seems when the original limitations are for life with remainder to children in tail and if any of the tenants for life die without children to the surviving tenants for life in tail,

Effect of gift to parents for life, remainder to children in tail, and if

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any parents  
die without  
children to  
the surviving  
parents in  
tail.

Some shares  
settled, others  
not.

followed by a gift over in case of a total failure of issue of all the tenants for life, survivorship will not be referred to the stocks. See *Maden v. Taylor*, 45 L. J. Ch. 569. See, however, *Cooper v. Macdonald*, 16 Eq. 258.

8. Where the shares of some members of the class are settled and others not, and the gift over is to the survivors of the class in the same way as the original shares, the case is more difficult.

In such a case the word survivors was construed others, chiefly by the force of a gift over in default of all the objects intended to be benefited. *Lucena v. Lucena*, 7 Ch. D. 255.

Where the  
shares of  
daughters are  
directed to  
be settled  
with a gift  
over if they  
die without  
children to  
the surviving  
sons and  
daughters.

If the gift is to a class of sons and daughters, and the daughters' shares are by a separate clause directed to be settled and given over in default of issue to the surviving sons and daughters in the same way as the original shares, survivors would not be construed as others. *De Garagnol v. Liardet*, 32 B. 608; *Re Usticke*, 35 B. 338; see *Nevill v. Boddam*, 28 B. 554.

On the other hand, if the shares of daughters dying without issue given to surviving members of the class are directed to be for the benefit of the other shares, survivors will be read others, at any rate as regards the settled shares. *Jackson v. Sparks*, 38 L. J. Ch. 75; and see the judgment of the M. R. in *Lucena v. Lucena*, *supra*.

Gift over to  
survivors  
subject to the  
same defeasibility  
as the  
original gift.

9. Where there was an absolute gift to several, with a gift to their issue if they died leaving issue, and if any died without issue to the survivors, subject to the same executory limitation in favour of issue as the original shares, survivorship has been referred to the *stirpes*, and not merely to the individuals. *Eyre v. Marsden*, 2 Kee. 564; 4 M. & Cr. 231; *Cross v. Maltby*, 20 Eq. 378; see *Le Jeune v. Le Jeune*, 2 Kee. 701.

But if the gift to survivors is absolute, and not subject to the same defeasibility in favour of issue as the original shares, survivors must be construed strictly, though there may be a gift over in the event of the death of all the legatees without issue. *Ferguson v. Dunbar*, 3 B. C. C. 468, *n*.

Under a gift in default of children of a daughter to the

others or other of his children by name, equally between them if more than one, the word others will not be read as survivors.

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*In Re Hagen's Trusts*, 46 L. J. Ch. 665; see *In re Chaston*; *Chaston v. Seago*, 17 Ch. D. 218.

Nor under a gift to a son by name and the survivors of the testator's daughters is it necessary that the son should survive in order to take. *In re Bates*, 11 W. R. 768.

#### AT WHAT PERIOD A CLAUSE OF SURVIVORSHIP CEASES TO OPERATE.

In gifts to survivors two further questions arise; in the first place, when is the class of survivors to be ascertained? in the second place, when do the interests become indefeasible?

1. The general rule is that, when the survivorship is upon death merely, the time of distribution is the limit of defeasibility. "Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy." *Cripps v. Woolcott*, 4 Mad. 11; *Stevenson v. Gullan*, 18 B. 590; *Neathway v. Read*, 3 D. M. & G. 18; *Howard v. Collins*, 5 Eq. 349; see *In re Duke*; *Hannah v. Duke*, 16 Ch. D. 112.

The period of distribution is the limit of defeasibility.

This is the case whether the only gift is in the direction to divide, as in *Cripps v. Woolcott*, or whether there is already a prior complete gift independent of that direction. *Hearn v. Baker*, 2 K. & J. 383.

The same rule applies to realty as to personalty. *In re Gregson's Trust Estate*, 2 D. J. & S. 428; *In re Belfast Town Council*; *Ex parte Sayers*, 13 L. R. Ir. 169.

If the tenant for life dies in the lifetime of the testator the survivors are fixed at the testator's death. *Spurrell v. Spurrell*, 11 Ha. 54; *Daniell v. Daniell*, 6 Ves. 297.

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Direct gift to  
several or the  
survivors.

a. Thus, in the case of a direct gift to several or the survivors, those who survive the testator take the whole. *Spurrell v. Spurrell*, 11 Ha. 54; 17 Jur. 755.

If payment is postponed till the age of twenty-one, survivorship refers to that. *Forrester v. Smith*, 2 Ir. Ch. 70; *Vorley v. Richardson*, 8 D. M. & G. 126.

Future gift to  
several or the  
survivors.

b. If there is a gift for life, followed by a gift to several or the survivors, or by a gift to several, and if any die, to the survivors, those who survive the period of distribution take indefeasibly. *Cripps v. Woolcott*, 4 Mad. 15; *Whitton v. Field*, 9 B. 369; *Naylor v. Robson*, 34 B. 571; *Vorley v. Richardson*, 8 D. M. & G. 126; see *Wordsworth v. Wood*, 1 H. L. 129; see *In re Dawes' Trusts*, 4 Ch. D. 210.

Gift upon a  
contingency  
to a class of  
survivors.

c. In the same way, if there is a gift for life and then to the children of the tenant for life who attain twenty-one and in default of such children to a class of survivors, the survivorship refers to the period when the prior gift fails. *Macdonald v. Bryce*, 16 B. 581; *Carver v. Burgess*, 18 B. 541; 7 D. M. & G. 96; *Taylor v. Beverley*, 1 Coll. 108.

Gifts to  
"surviving"  
children refer  
to the period  
of distribu-  
tion.

d. Upon the same principle, a gift after a life interest to "surviving children" goes to those who survive the tenant for life. *Huffam v. Hubbard*, 16 B. 579; *Stevenson v. Gullan*, 18 B. 590; *Thompson v. Thompson*, 29 B. 654; *Neathway v. Read*, 3 D. M. & G. 18.

So if there are several life interests followed by a gift to a class of survivors, they are ascertained at the death of the last tenant for life. *Re Fox's Will*, 35 B. 163.

But if the class of survivors are the children of one of the tenants for life, perhaps they would be fixed at the death of their parent. *Drakeford v. Drakeford*, 33 B. 43.

Contrary  
intention.

And if after a gift to surviving children there is a limitation giving the shares of such of the said children who die without issue before the tenant for life to survivors, the original limitation to surviving children must refer to those who survive the testator. *Evans v. Evans*, 25 B. 81; see *Stringer v. Phillips*, 1 Eq. Ab. 293, pl. 11; 1 P. Wms. 97, n.

2. The ordinary rule may, however, be excluded by the language of the will.

Thus, if the testator provides for the children of legatees between whom there is to be survivorship only in case they do not survive him, or gives large powers of making advances during the lifetime of the tenant for life to legatees among whom there is to be survivorship, it may appear that survivors were to be determined at his death. *Rogers v. Towsie*, 9 Jur. 575; *Blackmore v. Snee*, 1 De G. & J. 455.

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Effect of powers of advancement in limiting survivorship to the testator's death.

And, perhaps, if the gift to survivors is followed by words of limitation, such as executors and administrators or assigns, the argument that a personal enjoyment by the survivors was not intended might prevail, and survivorship would be referred to the death of the testator. *Rose d. Vere v. Hill*, 3 Burr. 1881; *Wilson v. Bayly*, 3 B. P. C. 195.

Effect of words of limitation.

At any rate, this would clearly be the case if the gift is after a life interest to surviving children, or their heirs and assigns, or to them or their heirs, where the substitutional gift shows that vested interests were intended to be taken at the testator's death. *Re Hopkins' Trust*, 2 H. & M. 411; *In re Stannard*; *Stannard v. Burt*, 52 L. J. Ch. 355.

3. If there is a life interest and a period of division as well, for instance, a gift to A. for life, then to a class to be paid at twenty-one, with a clause of survivorship, the question is more complicated. In such cases survivorship refers most naturally to the words with which it is placed in immediate connection.

Gifts to be paid at 21, after a life interest, with benefit of survivorship.

a. Therefore, if the gift is after a life interest to a class to be paid at twenty-one with benefit of survivorship, survivorship refers most naturally to the age of twenty-one just before mentioned. *Tribe v. Newland*, 5 De G. & S. 236; *Knight v. Knight*, 25 B. 111; *Forrester v. Smith*, 2 Ir. Ch. 70; *Berry v. Briant*, 2 Dr. & Sm. 1; *Corneck v. Wadman*, 7 Eq. 80.

This construction is assisted by a gift over upon death of all under twenty-one. *Salisbury v. Lamb*, 1 Ed. 465; Amb. 383; *Bouverie v. Bouverie*, 2 Ph. 349; *Alty v. Moss*, 34 L. T. N. S. 312.

Effect of a gift over upon death of all under 21.

On the other hand, it is rebutted if the gift over is upon death of all before the tenant for life. *Daniell v. Gossett*, 19 B. 478; *Fisher v. Moore*, 1 Jur. N. S. 1011; see, too, *Doe*

Gift over upon death before the tenant for life.

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Where the  
ordinary rule  
prevails.

*d. Lifford v. Sparrow*, 13 East, 359; *Gummoe v. Howes*, 23 B. 184, 192.

b. If, however, the direction as to payment is independent of the gift to survivors, the ordinary rule prevails; if, for instance, the gift is to surviving children at twenty-one. *Huffam v. Hubbard*, 16 B. 579; *Pope v. Whitcombe*, 3 Russ. 124; *Crozier v. Fisher*, 4 Russ. 398; *Lill v. Lill*, 23 B. 446; *Daniell v. Gossett*, 19 B. 478.

c. In a gift after a life interest to surviving brothers or their issue, surviving was referred to the testator's death. *Shailer v. Groves*, 2 Jarman, 737.

When the gift  
is upon death  
without issue.

4. If the gift to survivors is upon death without issue and the bequest is immediate, those surviving the testator would possibly take indefeasibly in the absence of a contrary intention. See *Bowers v. Bowers*, 5 Ch. 244; and the remarks of V.-C. Malins on that case, 11 Eq. 231; and see *ante*, p. 452.

And apparently the same rule will apply if there is a life interest. *Ingram v. Soutten*, L. R. 7 H. L. 408.

#### WHEN THE CLASS OF SURVIVORS IS TO BE ASCERTAINED.

When the gift  
is upon death  
without issue,  
the survivors  
are ascer-  
tained when  
the event  
happens.

1. In the class of cases last mentioned where the gift is upon death without issue, the survivors are ascertained whenever the event, upon which the shares are given over, occurs. *Leeming v. Sherratt*, 2 Ha. 14; *Nevill v. Boddam*, 28 B. 554; *Maden v. Taylor*, 45 L. J. Ch. 569.

Whether the  
last survivor  
takes inde-  
feasibly.

2. Whether the last survivor would take indefeasibly seems doubtful.

It has been held that when interests are given to several persons for life with remainder to their children, and in the event of any of them dying without issue, the shares of those so dying are given to the survivors absolutely, in the event of the last survivor dying without issue, such last survivor will take his share absolutely, the share being carried back to him by the survivorship clause. *Maden v. Taylor*, 45 L. J. Ch. 569; *Davidson v. Kimpton*, 18 Ch. D. 213; but see *In re Mortimer*; *Griffiths v. Mortimer*, 52 L. T. 383; 54 L. J. Ch. 414.

The difficulty of this construction is that it reads survivors in two different senses. The share of a legatee dying without issue and leaving several survivors would go to them—that is to say, to those who survive the event; on the other hand, the share of the last surviving legatee dying without issue is carried back to him not as surviving the event, but as the longest liver. See, too, *Re Corbett's Trusts*, Joh. 591.

3. In those cases where the period of defeasibility, or the period during which the gift to survivors is to take effect is limited, another difficulty arises with regard to the time at which the class of survivors is to be fixed. The question is whether the shares of those dying go over immediately to survivors, or whether only those can take as survivors who survive the period of defeasibility.

Whether when period of defeasibility limited, survivors are ascertained when event happens, or when shares become indefeasible.

a. If there is no vested gift, but only a gift to survivors after a life interest, or upon a contingency, there is no difficulty, and the class to take is ascertained at the time of division, or when the contingency happens. *Howard v. Collins*, 5 Eq. 349; *Carver v. Burgess*, 18 B. 541; 7 D. M. & G. 96; *Pritchard's Trusts*, 3 Dr. 163; see *In re Hill to Chapman*, 32 W. R. 410; 53 L. J. Ch. 541.

When there is no vested gift.

b. When there is a vested gift with a divesting clause in favour of survivors upon death merely, as, for instance, to a class and if any die to the survivors, the class to take will be ascertained at the time when the shares become indefeasible, that is to say, at the time of distribution, so that if there are no survivors at that time the original gifts are not divested. *Cambridge v. Rous*, 25 B. 409.

Divesting gift to survivors upon death merely.

c. But when the gift is to a class, with a gift to survivors, if any die before the tenant for life or before the period of distribution, so that no question as to the period of defeasibility can arise:

Gift to survivors if any legatees die before the period of distribution.

(i.) If the gift is direct to be paid at twenty-one and if any die under twenty-one to the survivors as tenants in common, the current of authority seems to show that the share of a legatee dying under twenty-one will go to those who survive him, though such survivors may not survive the period of distribution, or even the testator where the gift is to individuals, in which latter case the accrued share will lapse. *Ex parte*

Direct gift to be paid at 21, and if any die under 21 to the survivors.

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*West*, 1 B. C. C. 575; *Rickett v. Guillemard*, 12 Sim. 88; see, too, *Rudge v. Barker*, Ca. temp. Talb. 124, and cases there cited; *Worlidge v. Churchill*, 3 B. C. C. 465; *Pain v. Benson*, 3 Atk. 80; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Bardon v. Bardon*, 16 Ir. Ch. 415; see *Wakefield v. Dyott*, 7 W. R. 31; 4 Jur. N. S. 1098.

Future gift to several, and if any die before the tenant for life, to the survivors.

(ii.) If the gift is after a life interest to several and if any die before the tenant for life to the survivors as tenants in common, it appears to be now settled that survivors means those who survive the tenant for life, and therefore those who survive the tenant for life will take the whole, while, on the other hand, if none survive the tenant for life the prior interests are not divested. *Littlejohns v. Household*, 21 B. 29; *Marriott v. Abell*, 7 Eq. 478; see *Hunter's Trusts*, L. R. 1 Eq. 295. *Bright v. Rowe*, 3 M. & K. 316, if *contra*, must be considered overruled. It may, however, perhaps be classed under the preceding head, as the disposition was not of a fund in possession to a tenant for life with remainder, but of a reversionary fund subject to a prior life interest, to be paid upon its falling in. See, too, *Vorley v. Richardson*, 8 D. M. & G. 126.

When survivorship will be among the legatees.

(iii.) The testator may, however, show that he intended survivorship to be between the legatees, and not to have reference to the period of distribution.

If, for instance, the gift is to A. for life, and then to B. and C. equally, and if either die in A.'s life to the survivor of them the said B. and C., *his executors, administrators, or assigns*, there is a strong indication that the survivorship intended was between B. and C., and, therefore, upon B.'s death in A.'s life, C. immediately becomes entitled in remainder to the whole. *White v. Baker*, 2 D. F. & J. 55; see *In re Hill to Chapman*, 53 L. J. Ch. 541; 23 W. R. 410.

Gift to survivors if any legatees die without issue before the period of distribution. When there is a gift to the issue if any die leaving issue.

d. If the gift is if any die without issue before the period of distribution to survivors, the point seems to be more doubtful.

(i.) If there is a gift in the event of any dying before the period of distribution leaving issue to such issue, and if any die before the period of distribution without issue to the survivors since the gift to the issue takes effect upon the death of the parent, survivorship refers to the same point of time, namely,

the death of the person dying without issue. *Ive v. King*, 16 B. 46; *Eyre v. Marsden*, 2 Kee. 564; 4 M. & Cr. 231; *Wilmott v. Flewitt*, 13 W. R. 856; 11 Jur. N. S. 828. Chap.  
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(ii.) On the other hand, if the original gift is to a class living at the period of distribution, it seems more natural to refer the survivorship to the same period. *Essex v. Clement*, 30 B. 525. Original gift  
to class living  
at period of  
distribution.

(iii.) And, perhaps, the same will be the case where the gift is not of the shares of those dying before the period of distribution without issue to survivors, but the whole fund is directed to be divided in the event of any dying before the period of distribution among the survivors, implying that the whole fund is to be kept together till the period of distribution, and then divided among a class of persons capable of personal enjoyment. *Watson v. England*, 15 Sim. 1. See *Re Johnson's Trusts*, 10 L. T. N. S. 455. Where the  
whole fund  
is to be  
divided once  
for all.

(iv.) Where there are none of the indications of intention above mentioned, it seems doubtful what the rule would be. *Crowder v. Stone*, 3 Russ. 217; and *Young v. Robertson*, 4 Macq. 314, appear to be in direct conflict on the point, and the latter being a Scotch case, it is difficult to say how far its authority would be followed, especially as it is in other respects not entirely in harmony with the current of English authority. As far as principle or convenience goes the arguments seem to be fairly balanced. Crowder v.  
Stone, and  
Young v.  
Robertson.

A gift over upon death without issue means death without issue at any time, in the absence of an indication of intention to limit the period of defeasibility. The class of survivors, therefore, would have to be fixed whenever the contingency happens, and there seems no reason for saying that the mere limiting of the period of defeasibility should introduce a contingency into the bequest to survivors and make the gift of accruing shares conditional upon surviving the period of defeasibility.

The gift over to survivors, being upon death without issue, it is the failure of issue of members of the original class which is the leading motive in the testator's mind, and not death before the period of enjoyment. The share is given to survivors not because the original members of the class do not live to enjoy it, but because they have no children to benefit. The intention

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is to benefit not only the original class but their children, whereas, if the survivors are not fixed till the time when the shares become indefeasible, children of such members of the original class as die before that time will take no interest in the shares of those who die without issue, an argument which, as already remarked, becomes conclusive if there is a prior gift to the children of those who die leaving children.

On the other hand, if the shares go over at once, and several die without issue in the lifetime of the tenant for life, the representatives of the longer lived will take more than the representatives of those dying previously, while the representatives of the person dying first will take nothing, and it may be said that this can hardly have been the testator's intention; but he would probably have provided for such a contingency if he had contemplated it, and his omission to do so ought not to affect the construction of the will.

On the whole, however, it must be admitted that the balance of recent authority is in favour of the principle adopted in *Young v. Robertson*. See the opinion of the V.-C. Malins, 7 Eq. 483, 484.

Case when  
the period of  
defeasibility  
is construc-  
tively  
limited.

e. What the case would be when, the gift being upon failure of issue of any of the legatees to the survivors, the Court limits the period of defeasibility by construction to the lifetime of the tenant for life, there is no authority to show. In such a case it would seem the argument above mentioned in favour of immediate accruer would apply with greater force, as the period of defeasibility is only remotely present to the testator's mind.

#### ACCRUED SHARES.

Accrued are  
not subject to  
the defeasi-  
bility of  
original shares  
without ex-  
press words.

Clauses in a will disposing of the shares of devisees and legatees dying before a given period or event, do not, without a positive and distinct indication of intention extend to shares which have once accrued under those clauses so as to pass them a second time. *Ex parte West*, 1 B. C. C. 575; *Melsom v. Giles*, L. R. 5 C. P. 614; *ib.* 6 C. P. 532; *ib.* 6 H. L. 24.

Therefore accrued shares will not pass under the word share

or portion. *Cambridge v. Rous*, 25 B. 416; *Bright v. Rowe*, 3 M. & K. 316.

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But accrued shares will go with original shares if there is an intention expressed that they should do so.

1. If, for instance, accrued shares are directed to go in the same manner as original shares. *Cursham v. Newland*, 2 B. 145; *Milsom v. Awdry*, 5 Ves. 465; *Eyre v. Marsden*, 4 My. & Cr. 231; *Melsom v. Giles*, L. R. 6 H. L. 24.

Accrued shares directed to go as original shares.

2. And when original and accrued shares have once been consolidated by a direction, for instance, that they are to go in the same manner, "there is no occasion to carry on any separate account of the original share from the accrued share," and both will pass under the word share. *Re Hutchinson*, 5 De G. & S. 681.

Consolidation of original and accrued shares.

3. If "his or her share or shares" are spoken of where only one original share has been previously given, so that the words cannot be satisfied *reddendo singula singulis*, as might be the case if the words were "his, her, or their, share or shares," accrued shares will be carried over. *Wilmott v. Flewitt*, 13 W. R. 856; *In re Chaston*; *Chaston v. Seago*, 18 Ch. D. 218.

Words applicable to accrued shares.

And, apparently, "share and shares and interest," would carry accrued shares. *Douglas v. Andrews*, 14 B. 347.

4. Accrued shares will pass where the testator, though he speaks of individual shares, yet shows that he looks on the fund as existing at the period of distribution as an aggregate and previously undivided fund by speaking of it, for instance, as the trust fund. *Worlidge v. Churchill*, 3 B. C. C. 465; *Leeming v. Sherratt*, 2 Ha. 14; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Barker v. Lea*, T. & R. 413.

Where the fund is treated as an aggregate fund.

So, where the whole fund is given to a class, with benefit of survivorship, the words of survivorship apply to the whole, accrued as well as original shares. *In re Crawhall's Trusts*, 2 Jur. N. S. 892.

5. And a gift over of the whole is convincing evidence of the same intention. In such a case "share must have been meant to include every interest accruing as well as original, for otherwise the estate would go away from the issue piecemeal; whereas, it is obvious, nothing was intended to go over, but

Gift over of the whole fund.

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that all should go over at once on failure of the issue of all the children, as if all but one had died without issue who was intended to take all." *Doe d. Clift v. Birkhead*, 4 Ex. 110; *Douglas v. Andrews*, 14 B. 347; *Dutton v. Crowdy*, 33 B. 272; *Langley v. Langley*, 6 L. R. Ir. 277.

Where the  
gift is re-  
siduary.

6. And if the bequest is of residue, the presumption against intestacy will assist the Court in passing accrued with original shares. *Goodman v. Goodman*, 1 De G. & Sm. 695.

Accrued  
shares are  
*prima facie*  
not subject  
to the restric-  
tion of original  
shares.

7. Accrued shares are similarly not liable to the same restrictions as original shares in the absence of a clearly expressed intention so to restrict them. *Gibbons v. Langdon*, 6 Sim. 260; *Ware v. Watson*, 7 D. M. & G. 248; and, on the other hand, *Trickey v. Trickey*, 3 M. & K. 560; *Jarman's Trusts*, L. R. 1 Eq. 71; *Fitzgerald v. Fitzgerald*, I. R. 7 Eq. 436.

## CHAPTER XXXIX.

## THE CONSTRUCTION OF GIFTS OVER.

## GIFTS OVER UPON DEATH BEFORE VESTING.

A GIFT over of the share of a legatee who dies before attaining a vested interest takes effect if the legatee dies in the lifetime of the testator, whether under or over the age appointed for vesting. *Re Gaitskell's Trusts*, 15 Eq. 386.

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Gift over  
upon death  
before vesting.

A gift over upon the death of the legatees before attaining a vested interest refers *primâ facie* to death before vesting in interest.

Vesting  
*primâ facie*  
refers to  
vesting in  
interest.

This is the case whether the gift be immediate or in remainder. *Parkin v. Hodgkinson*, 15 Sim. 293; *Re Arnold's Estate*, 33 B. 163; *Richardson v. Power*, 19 C. B. N. S. 780.

If, however, the gift over be to persons living at the period of distribution, there is a strong argument that the word vested was used as equivalent to vested in possession: *Young v. Robertson*, 4 Macq. 314, where the gift over upon the death of any before attaining a vested interest was to the survivors, which was read as equivalent to those who survive the period of distribution, and *Greenhalgh v. Bates*, L. R. 2 P. & D. 47, where the gift over was to the next of kin of the tenant for life, who could not be ascertained till her death.

When the  
gift over to  
persons living  
at the period  
of distribu-  
tion.

So, if the legacies would be vested in interest at the testator's death, and the gift over is, if any of the legatees die during the testator's life, or after his decease, without attaining vested interests, vested must mean vested in possession. *King v. Cullen*, 2 De G. & S. 252.

And, in the same way, the testator may show that he used Vested used

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as equivalent  
to paid.

"vested" in the gift over, as equivalent to "paid," if the gift over is, if any die before their share should be vested as afore-said, when only directions as to payment have been previously given. *Sillick v. Booth*, 1 Y. & C. C. 121, 126.

If the testator expressly provides for the death of the legatees in his lifetime, a gift over upon death before vesting refers to vesting in possession. *In re Morris*, 5 W. R. 423.

### GIFTS OVER UPON DEATH BEFORE PAYMENT.

Gift over  
upon death  
before pay-  
ment after  
an immediate  
gift with a  
period of  
payment.

A. In the case of a direct gift, followed by a gift over, if any of the legatees die before their legacies are payable.

1. If a period for payment is appointed the gift over takes effect :

a. If the prior legatee dies in the testator's lifetime, whether after the age fixed for payment or not. *Walker v. Main*, 1 J. & W. 1 ; *Gaitskill's Trust*, 15 Eq. 386.

b. If the prior legatee survives the testator, but dies before the time fixed for payment. *Jenkins v. Jenkins*, Belt's Supplement, 264 ; *Rammell v. Gillow*, 9 Jur. 704 ; and see *Woodburne v. Woodburne*, 3 De G. & S. 643.

Where no  
period for  
payment is  
appointed.

2. If no time is fixed payable refers to the testator's death. *Rammell v. Gillow*, 9 Jur. 704 ; *Collins v. Macpherson*, 2 Sim. 87 ; *Cort v. Winder*, 1 Coll. 320.

Gift over  
upon death  
before pay-  
ment where  
there is a  
life interest.

B. If there is a life interest, followed by a bequest to certain persons, and a gift over in the event of death before the respective legacies become payable, no time being appointed for division or payment, the gift over takes effect with respect to those legatees who die before the tenant for life. *Crowder v. Stone*, 3 Russ. 217 ; *Creswick v. Gaskell*, 16 B. 577.

Meaning of  
the word  
"entitled."

The word entitled, however, is more easily susceptible of the meaning vested than the word payable, and it will accordingly be taken to mean entitled in right and not in possession, and referred to the death of the testator and not of the tenant for life, if the latter meaning would have the effect of divesting a previously vested gift. See *Commissioners of Charitable Donations v. Cotter*, 2 D. & Wal. 615 ; 1 D. & War. 498 ; *Henderson v. Kennicott*, 2 De G. & S. 492. See *Beale v.*

*Connolly*, L. R. 8 Eq. 412; *Jopp v. Wood*, 28 B. 53; 2 D. J. & S. 323.

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C. If there is a life interest as well as a period of payment the question is more complicated.

Effect of gift over upon death before payment when there is a life interest and a period of payment.

The most numerous cases on this head have occurred in marriage settlements, where, in addition to the leaning in favour of vesting, the Court is assisted by the legal presumption that the children were intended to be provided for at the time when their portions were wanted, whether they survived the tenant for life or not. See *Emperor v. Rolfe*, 1 Ves. sen. 208.

The same rules of construction are, however, applicable to wills. At the same time it must be remembered that the tendency of the Court at the present day is to give words their natural meaning, and it is probable that many of the old authorities cited below would not now be followed. The cases may be classified under the following heads:—

1. If there is a gift to A. for life, followed by a bequest to his children, whether at twenty-one, or payable at twenty-one, with a gift over on death before the legacy is payable, the gift over is good as regards legatees who die in the testator's lifetime, whether under or over twenty-one. *Walker v. Main*, 1 J. & W. 1; the share of Mary Main, who it appears had attained twenty-one. See *Gaitskell's Trust*, 15 Eq. 386.

Effect of the death of the legatee before the testator.

2. If there is a gift to A. for life followed by a contingent bequest to his children, as, for instance, to the children at twenty-one, or to be vested at twenty-one, and a gift over in the event of death before the shares are payable, if the word payable were taken in its ordinary meaning as referring to the time at which the money is actually distributable, it would involve the double contingency of surviving the tenant for life and attaining twenty-one, and therefore the Court confines it to the latter, which is the event when the bequest is most likely to be required, and this is the case whether there is provision for the issue of the children or not. *Mendham v. Williams*, L. R. 2 Eq. 396; *Mocatta v. Lindo*, 9 Sim. 56; *Jones v. Jones*, 13 Sim. 561; *Bouverie v. Bouverie*, 2 Ph. 349; *In re Crofton's Trusts*, 7 L. R. Ir. 279; *Wakefield v. Richardson*, 13 L. R. Ir. 17; *Partridge v. Baylis*, 17 Ch. D. 835.

Bequest contingent upon attaining 21 is indefeasible at that age.

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The same will be the case whether the word used is "received" or "receivable:" *West v. Miller*, 6 Eq. 59; *Dodgson's Trust*, 1 Dr. 440; or "entitled in possession," or "entitled to the receipt," or "entitled to payment," or "before they have received or become possessed." *Re Yates' Trust*, 21 L. J. Ch. 281; *Hayward v. James*, 28 B. 523; *Re Williams*, 12 Beav. 317; *Rammell v. Gillow*, 9 Jur. 704.

Effect of gift over to issue of those dying before the time of payment, when the shares are to be vested at marriage.

3. When the shares of daughters are directed to be vested at twenty-one, or marriage, and there is a gift over, if any of the legatees die before their shares are payable, to their issue, there seems to be some doubt whether it would not be necessary to construe "payable" in its ordinary meaning, since a daughter could not die leaving issue before her share becomes payable if "payable" meant "vested."

It seems, however, that if the gift over is simply of the shares of legatees who die before the time of payment, the construction would not be affected by this fact. *Mendham v. Williams*, L. R. 2 Eq. 396.

On the other hand, if the gift over is not simply of their shares, but of the shares to which the parents would have been entitled if living, since the parents would have been entitled to nothing unless they survived the period of vesting, and the daughters could not have had issue without taking vested shares, payable will have its literal meaning. *Day v. Radcliffe* 3 Ch. D. 654.

Probably, however, *Mendham v. Williams* and *Day v. Radcliffe* cannot stand together.

Where there is a vested gift to be paid at 21.

4. Where the gift to the children is vested at birth and payment only is postponed, and there is no provision for the issue of the children and a gift over in the event of death before the shares become payable: as, for instance, to A. for life and then to his children, to be divided at twenty-one, with a gift over if any die before their shares are payable, in this case payable will be held to mean attaining twenty-one, for otherwise the issue of those children would not take who died in the lifetime of the tenant for life over twenty-one. *Hallifax v. Wilson*, 16 Ves. 168; *Walker v. Main*, 1 J. & W. 1; *Salisbury v. Lamb*, 1 Ed. 465; *Re Williams*, 12 B. 317; *Hayward v. James*, 28 B. 523; *Wakefield v. Maffet*, 10 App. C. 423.

The construction will be the same where the issue only of such children are provided for as die under twenty-one. *Mocatta v. Lindo*, 9 Sim. 56.

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If, however, there is after a bequest for life a bequest to children vested at their births, and the time of division is alone postponed with provision for the issue of children dying at any time during the life of the tenant for life, and a gift over if they die before the legacies become payable, the word payable will bear its ordinary meaning and refer to the death of the tenant for life.

When the issue of those dying before the period of distribution are provided for in all events.

For instance, if the gift be to A. for life, then to her children, to be transferred to them at twenty-one, and if any die before their shares are payable, leaving issue, to such issue, and if any die before their shares are payable without issue over, since the fund becomes actually payable on the death of the tenant for life, and there is no reason to adopt any other construction in order to favour the issue, who are already provided for, the gift over will be good on the death of the legatees during the life of the tenant for life, though they may have attained twenty-one. *Willmott's Trusts*, 7 Eq. 532; *Chell v. Chell*, 23 W. R. 252.

It may, however, be noticed that the construction of payable, as meaning attaining twenty-one, especially in cases under the first head, is materially assisted by such words as "to be paid," or "payable" at twenty-one, and "it is no strain to understand the testator as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment." *Hallifax v. Wilson*, 16 Ves. 168.

Effect of the collocation of words upon the construction.

5. If the death of the tenant for life is the earliest period at which the gift can be payable; if, for instance, the gift is to such as survive the tenant for life, to be paid at twenty-one, with a gift over upon death before the shares become payable; the word payable would in all probability receive its ordinary meaning and be referred to the period of distribution. *Bielefeld v. Record*, 2 Sim. 354.

When the original gift is contingent upon surviving the tenant for life, "payable" bears its ordinary meaning.

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GIFTS OVER UPON DEATH BEFORE ACTUALLY RECEIVING  
THE LEGACY.

Gift to  
persons living  
at the testa-  
tor's death,  
with a gift  
over upon  
death before  
payment.

When it is clear that the testator refers only to legatees living at his death and there is a gift over if any die before their shares are payable or before receiving their shares, the gift over cannot refer to death in the lifetime of the testator. V.-C. Kindersley, in such a case, held that the gift over was good with regard to the shares of those who died within a year after the testator's death; but, apparently, in such a case, the Court would inquire at what time the money might have been paid. *Arrowsmith's Trusts*, 29 L. J. Ch. 775; 6 Jur. N. S. 1231; on appl., 2 D. F. & J. 474; *In re Chaston*; *Chaston v. Seago*, 18 Ch. D. 218; *Wilks v. Bannister*, 33 W. R. 922.

In the same way under an immediate bequest with a gift over upon death "before me or before the division or final division of my estate," the gift over takes effect upon the shares of legatees dying within a year from the testator's death. *In re Collison*; *Collison v. Barber*, 12 Ch. D. 834; *In re Wilkins*; *Spencer v. Duckworth*, 18 Ch. D. 634. See *In re Potts*; *Hooley v. Fountain*, W. N. 1884, 106.

Gift over  
upon death  
before actual  
receipt.

If, however, the gift over is in the event of death before the legacy is actually paid or received, there is some doubt whether the gift over will take effect. See *Hutcheon v. Mannington*, 1 Ves. jun. 366; 4 B. C. C. 491; *Martin v. Martin*, L. R. 2 Eq. 404; *Minors v. Battison*, 1 App. C. 429.

According to the earlier authorities, which have not been unanimously followed, it seems that, though the Court will be unwilling to put upon any words a meaning which would divest a previously vested gift if the legatee dies before actually receiving it, nevertheless, where such an intention is clearly expressed, effect must be given to it. See *Gaskell v. Harman*, 11 Ves. p. 497:

"If a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies or the residue, unless they live to receive them in hard money, there is no rule against such intention, if clearly expressed. But that

would open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *Hutcheon v. Mannington*, I admit, I thought the meaning of those words was, what they shall have received ; and I thought so even after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him." See, too, *Sitwell v. Bernard*, 6 Ves. 535.

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Thus, for instance, as already noticed, death before receiving will not mean before actually receiving, but before being entitled to receive. See, too, *Whiting v. Force*, 2 B. 571 ; and see *In re Kirkbride's Trusts*, L. R. 2 Eq. 400.

On the other hand, if the intention is clearly expressed the legacy will be divested if the legatee dies before actually receiving payment. *Whitman v. Aitken*, 2 Eq. 414 ; *Johnson v. Crook*, 12 Ch. D. 639. See, however, *Martin v. Martin*, *supra* ; *Minors v. Battison*, *supra* ; *Bubb v. Padwick*, 13 Ch. D. 517.

In the same way if there is a gift upon trust for sale and division among certain legatees, a gift over if any die before the sale is completed is valid. *Faulkener v. Hollingworth*, cit. 8 Ves. 559 ; *Elwin v. Elwin*, 8 Ves. 547 ; see *Bernard v. Montague*, 1 Mer. 433 ; see 11 Ves. 508.

Death before  
sale com-  
pleted.

But even when the gift over is upon death before actual receipt, the negligence of an executor will not be allowed to prejudice the legatee, and an inquiry will be directed as to the time at which, with reasonable diligence, the legacy ought to have been paid. *Law v. Thompson*, 4 Russ. 92.

Negligence of  
executor will  
not prejudice  
the legatee.

A gift over upon death before the execution of all or any of the trusts of the will is void. *Roberts v. Youle*, 49 L. J. Ch. 744.

Death before  
execution of  
trusts.

#### GIFTS OVER UPON DEATH UNMARRIED AND WITHOUT ISSUE.

1. In a gift over upon death unmarried without any explanatory context, unmarried means never having been married. *Dalrymple v. Hall*, 29 W. R. 421.

Unmarried.

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Gift over  
upon death  
unmarried  
and without  
issue when  
vested inter-  
ests are  
given upon  
marriage.

2. Where vested interests are given at twenty-one or marriage, a gift over upon death unmarried and without issue will mean never having been married. *Heywood v. Heywood*, 29 B. 9; *Pratt v. Matthew*, 8 D. M. & G. 522; *Gonne v. Cooke*, 15 W. R. 576.

3. And, perhaps, the same construction would be adopted where the gift is to A. simply and if he dies unmarried and without issue over; the argument in favour of the construction being that A.'s interest would then be indefeasible upon his marriage. See *Heywood v. Heywood*, *supra*; see *In re Saunders' Trusts*, 3 K. & J. 152; *Radford v. Willis*, 7 Ch. 7.

The case of *Doe d. Baldwin v. Rawding*, 2 B. & Ald. 441, is not opposed to this view, since the donee there left a husband surviving her, so that upon no construction of unmarried could the gift over take effect. The point did not arise in *Bell v. Phyn*, 7 Ves. 450.

4. Of course, if the legatee were married at the date of the will this construction would be impossible.

Unmarried  
may refer to  
a second  
marriage.

In *Crosthwaite v. Dean*, 5 Eq. 245, a gift over of a fund in case the legatee should marry or die unmarried, where the legatee was married at the date of the will and of the testator's death, but her husband was believed to be dead, was held to refer to a second marriage. See, too, *Lepine v. Bean*, 10 Eq. 160; *Smith v. Charles*, 13 W. R. 224.

Gift over  
upon death  
unmarried  
and without  
issue after a  
prior gift to  
the legatee  
for life, and  
then to his  
children.

5. If the gift is to A. for life, remainder to his children, and if A. dies unmarried and without issue over, unmarried will be read as equivalent to not having a wife at his death. To read it as never having been married would increase the chance of intestacy, since in that case, if A. married and had no children, the gift over would not take effect; and, again, the word unmarried would be mere surplusage. *Doe d. Everett v. Cooke*, 7 East. 269; *In re Sanders' Trusts*, L. R. 1 Eq. 675.

"AND" CHANGED INTO "OR" IN GIFTS OVER.

Devise to A.  
in fee, and if  
he dies under  
21 and without  
issue over.

1. If there is a devise to A. in fee and if he dies under twenty-one and without issue over, "and" will not be read "or." To do so would have the effect of divesting a prior

devise in events other than those mentioned. *Malcolm v. Malcolm*, 21 B. 225; *Coates v. Hart*, 32 B. 349; 3 D. J. & S. 504.

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And, similarly, a gift to A. for life, and then to her children, and if she dies under twenty-one and without children over, will not be construed as if it were under twenty-one or without children. *Key v. Key*, 1 Jur. N. S. 372.

2. If the devise is to A. in tail and if he dies under twenty-one and without issue over, "and" will not be read "or." *Grey v. Pearson*, 6 H. L. 61, and *Doe d. Usher v. Jessep*, 12 East, 288; overruling *Brownsword v. Edwards*, 2 Ves. sen. 243, so far as it is an authority on this point. In this case there is reason for contending that the devise over ought to be read as equivalent to "if he dies under twenty-one or at any time without issue," since the estate would take effect as a remainder after an estate tail; but this would deprive the issue of any benefit if the devisee died under twenty-one leaving issue, unless the devise were read under twenty-one without issue, or at any time without issue, involving a very considerable alteration of the words of the will.

Devise to A.  
in tail, and if  
he dies under  
21 and with-  
out issue  
over.

This latter construction, however, would perhaps be adopted if the original devise in tail were made contingent upon the devisee attaining twenty-one or having issue. *Brownsword v. Edwards*, 2 Ves. sen. 243.

3. A different question arises where the gift over is upon two events, one of which includes the other, as "if A. dies unmarried and without children."

Gift over  
upon two  
events, one of  
which in-  
cludes the  
other.

If the gift is to A. for life and then to his children absolutely, so that if A. has no children there would be an intestacy, there are three possible constructions:

a. If possible, unmarried will be held to mean unmarried at the time of death, and it is then unnecessary to change "and" into "or." *Doe v. Rawding*, 2 B. & Ald. 441; *Doe d. Everett v. Cooke*, 7 East, 269; *In re Sanders' Trusts*, L. R. 1 Eq. 675; see *ante*, p. 488.

Unmarried if  
possible will  
mean not  
married at  
the death.

The same is the case if unmarried means "not married by consent." *Dillon v. Harris*, 4 Bl. N. S. 321.

b. If, however, it is clear that unmarried must mean never If unmarried

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must mean  
never mar-  
ried, "and"  
will be  
changed  
into "or."

having been married, it seems doubtful whether "and" will not be changed into "or." According to the earlier cases, there is no doubt that the change would be made. *Wilson v. Bayly*, 3 B. P. C. 195; *Hepworth v. Taylor*, 1 Cox, 112; *Maberley v. Strode*, 3 Ves. 450; *Bell v. Phym*, 7 Ves. 453.

These cases are, however, of doubtful authority, since the term "unmarried" would probably now in all similar cases be held equivalent to "not married at the death."

The question in *Grey v. Pearson*, 6 H. L. 61, was so different that it can hardly be said to have any bearing upon this point.

Gift over  
after an ab-  
solute inte-  
rest, if the  
legatee dies  
before mar-  
riage and  
without  
issue.

c. But if the gift is to A. absolutely, and if he dies before marriage and without children over, "and" will not be read "or," as to do so would be to increase the defeasibility of interests already completely disposed of in all events. *Secombe v. Edwards*, 28 B. 440.

"And" will not be changed into "or" where the gift over is upon death in the testator's lifetime, and before receiving any benefit. *In re Kirkbride's Trusts*, L. R. 2 Eq. 400.

Gift over  
upon two  
independent  
events.

4. Where the two events upon which the gift over is made to depend are independent of each other, there can be no reason for changing "and" into "or." *Day v. Day*, Kay, 703; *Reed v. Braithwaite*, 11 Eq. 514; see *Barker v. Young*, 33 B. 353.

#### CHANGE OF "OR" INTO "AND" IN GIFTS OVER.

Gift over  
upon death  
under age  
or without  
lawful issue.

1. If there is a devise to A. in fee if she dies leaving lawful issue, but if she dies under age or without lawful issue over, "or" will be read "and." *Johnson v. Simcock*, 6 H. & N. 6; 9 W. R. 895.

2. If the devise is to A. in fee, and if he dies under twenty-one or without issue over, "or" will be read "and," to favour the issue of A. *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Denn v. Wilkins v. Kemays*, 9 East, 366; *Eastman v. Baker*, 1 Taunt. 174; *Morris v. Morris*, 17 B. 198.

3. If the devise is to A. for life, remainder to his children in tail, and if A. dies under twenty-one or without children over, it is doubtful whether "or" would be read "and." According to the earlier authorities, the change would be made. *Hasker*.

v. *Sutton*, 1 Bing. 501; 9 J. B. Moo. 2; but see *Cooke v. Mirehouse*, 34 B. 27.

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4. And where, after a prior absolute gift, the gift over is upon failure of issue or some other event, such as not making a will, "or" will be read "and," though the gift over may thereby become void. *Incorporated Society v. Richards*, 1 D. & War. 258; *Greated v. Greated*, 26 B. 621; *Green v. Harvey*, 1 Ha. 428.

Gift over upon failure of issue or some other event.

5. But if the devise is to A. in tail and if he dies under twenty-one or without issue over, "or" will not be construed "and;" though, on the other hand, it seems that if the devisee died under twenty-one leaving issue, the gift over would not be held to have taken effect, so that the devise would, in fact, be construed as equivalent to "if A. dies under twenty-one without issue or without issue at any time." *Mortimer v. Hartly*, 6 Ex. 47; *Soulle v. Gerard*, Cro. Eliz. 525; *Woodward v. Glasbrook*, 2 Vern. 388; and Lord St. Leonard's judgment in *Grey v. Pearson*, 6 H. L. 61. The devise over in this case takes effect as a remainder after an estate tail.

Devise to A. in tail, and if he dies under 21 or without issue over.

6. But if the devise over after an estate tail to A. is in case of the death of A., or want of his issue, "or" must be read "and," in order to preserve the prior estate. *Monkhouse v. Monkhouse*, 3 Sim. 119.

Gift over in case of death of the devisee or failure of his issue.

7. "Or" will be read "and" when a gift is given upon either of two events, as upon attaining twenty-one or marriage, and there is gift over upon death under twenty-one or unmarried, the gift over being otherwise inconsistent with the prior gift. *Grant v. Dyer*, 2 Dow. 87; *Thompson v. Teulon*, 22 L. J. Ch. 243; *Thackeray v. Hampson*, 2 S. & St. 214; *Grimshawe v. Pickup*, 9 Sim. 591; *Collett v. Collett*, 35 B. 312.

"Or" read "and" in the gift over when the gift is vested in one or other of the two events.

8. In some cases where there has been a gift contingent upon attaining twenty-one, subject to a life interest, and a gift over upon death before the tenant for life or under twenty-one, "or" has been read "and." *Miles v. Dyer*, 5 Sim. 435; 8 Sim. 330; *Benley v. Meech*, 25 B. 197.

Gift over upon death before the tenant for life, or under 21.

And if a gift over upon death under age or without leaving a husband is afterwards referred to as "in case of death under

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age as aforesaid," "or" will be read "and." *Weddell v. Mundy*, 6 Ves. 341.

#### GIFT OVER UPON DEATH WITHOUT CHILDREN.

"Children" read "issue" in a gift over upon death without children.

In many cases where an estate in fee is given, followed by a gift over in the event of the devisee dying without children, the word children has been construed as synonymous with issue. *Doe v. Webber*, 1 B. & Ald. 713; *Doe d. Simpson v. Simpson*, 5 Sc. 770; 4 Bing. N. C. 333; *Doe d. Blesard v. Simpson*, 3 M. & Gr. 929; *Bacon v. Cosby*, 4 De G. & S. 261; *Parker v. Birks*, 1 K. & J. 156; *Richards v. Davies*, 13 C. B. N. S. 69, 861; see *Mathews v. Gardiner*, 17 B. 254.

And the same construction would perhaps be put upon a similar gift over after an absolute bequest of personalty. *Synge's Trust*, 3 Ir. Ch. 379; see *Stone v. Maule*, 2 Sim. 490.

#### GIFTS OVER UPON DEATH WITHOUT LEAVING OR HAVING ISSUE.

Leaving construed as equivalent to having.

The word leaving in a gift over upon death without leaving issue will, if possible, be so construed as not to destroy prior vested interests, it will in fact be taken as equivalent to "without having had children who take vested interests."

1. Thus, when there is a bequest or devise to A. for life and after his death to his children, whether a particular time is fixed at which their shares are to vest or not, followed by a gift over upon the death of A. without leaving children, the children of A., either at their birth or at the particular time appointed, as the case may be, take indefeasible interests not liable to be defeated by death during the life of A. *Maitland v. Chalie*, 6 Mad. 243; *Marshall v. Hill*, 2 Mau. & S. 608; *Ex parte Hooper*, 1 Dr. 264; *Kennedy v. Sidgwick*, 3 K. & J. 540; *Re Thompson's Trusts*, 5 De G. & S. 667; *White v. Hill*, 4 Eq. 265; *Casamajor v. Strode*, 8 Jur. 14; *In re Brown's Trust*, 16 Eq. 239; *Treharne v. Layton*, L. R. 10 Q. B. 459.

2. The same construction has been followed where there was

a devise to A. absolutely and after her death without leaving issue over. *White v. Hight*, 12 Ch. D. 751.

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3. The Court, however will not depart from the ordinary meaning of the word leaving, in order to vest interests which were not vested before.

When the gift is, for instance, if the tenant for life leaves children, to all such children, with a gift over in the event of his death without leaving children, the word leaving must have its ordinary meaning. In these cases the condition of surviving the tenant for life is part of the original gift, and there is no question of divesting a prior gift. *Sheffield v. Kennett*, 27 B. 207; 4 De G. & J. 593; *Bythessa v. Bythessa*, 17 Jur. 645; 23 L. J. Ch. 1004; *Young v. Turner*, 1 B. & S. 550; see *In re Watson's Trust*, 10 Eq. 36, and the comments therein upon *Bryden v. Willett*, 7 Eq. 472; *Jeyes v. Savage*, 10 Ch. 555; and see *Hedges v. Harper*, 3 De G. & J. 129.

4. It seems the words "without having any child" may be construed as equivalent to "without having had" any child. *Weakley d. Knight v. Rugg*, 7 T. R. 322; *Wall v. Tomlinson*, 16 Ves. 413; *Jeffreys v. Conner*, 28 B. 328.

5. But the words "without any children" mean without children at the death. *Thicknesse v. Liege*, 3 B. P. C. 365; *Jeffreys v. Conner*, *supra*; see *In re Hambleton*; *Hambleton v. Hambleton*, W. N. 1884, 157.

## CHAPTER XL.

## GIFTS OVER UPON DEATH WITHOUT ISSUE.

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Gift over  
upon death  
of the devisee  
without issue  
before a given  
period.

Gift over  
upon death  
without issue  
to persons  
then living.

Effect of the  
29th sec. of  
the Wills Act  
upon gifts in  
default of  
issue.

WHEN there is a gift over upon the death of A. without issue before a given period, the gift over takes effect upon the failure of issue of A., not necessarily at his death, but at any time before the given period, whether the will is before or since the Wills Act. *Jarman v. Vye*, L. R. 2 Eq. 784.

It is not quite clear whether a devise upon failure of issue to such of certain named legatees as should be "then living," which would in a will before the Act have been held to take effect upon failure of issue of the ancestor at his death, or at any time during the lives of the surviving legatees, would now be held to take effect only upon failure of issue of the ancestor at his death. See *Murray v. Addenbrook*, 4 Russ. 407; *Greenwood v. Verdon*, 1 K. & J. 74.

By the 29th section of the Wills Act, 1 Vict. c. 26, words "which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for

obtaining a vested estate by a preceding gift to such issue." Chap. XL.  
See *In re Chinnery's Estate*, 1 L. R. Ir. 296.

The words dying without male issue will, under this section, be restricted to male issue living at the death of the ancestor. Death without issue male.  
*Upton v. Hardman*, 1 R. 9 Eq. 157.

This section does not apply:—

1. Where the words used are heirs of the body and not issue. In what cases the section does not apply.  
*Harris v. Davis*, 1 Coll. 416; *Re Sallery*, 11 Ir. Ch. 236; *Dawson v. Small*, 9 Ch. 651.

2. Where the failure of issue would not before the Act have been construed to import an indefinite failure of issue. *Morris v. Morris*, 17 B. 198.

3. Apparently it would not apply where there is a gift of personalty to A. and the heirs of his body, followed by a gift over in default of his issue. At any rate, it does not where realty and personalty are given together in tail. *Green v. Green*, 3 De. G. & Sm. 480; see *Greenway v. Greenway*, 2 D. F. & J. 137; *Green v. Giles*, 5 Ir. Ch. 25.

#### REFERENTIAL CONSTRUCTION OF GIFTS OVER UPON DEATH WITHOUT ISSUE.

The construction of gifts over in default of issue is not affected by the Wills Act, where those words are construed to mean default of issue to take under the preceding limitations. It becomes necessary, therefore, to consider in what cases the referential construction has been adopted.

A. Where the words are for default of *such* issue, they naturally refer to the issue before mentioned.

1. This is clearly the case where the prior limitations are in tail. *Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 320. Gift over in default of such issue, after limitations in tail.

2. So where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. *Doe d. Comberbach v. Perryn*, 3 T. R. 484; *Rex v. Marquess of Stafford*, 7 East. 521. After limitations in fee.

But if there is anything to show that the children were intended to take estates tail, the words in default of such issue

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may be referred to the word heirs so as to cut down the estates to estates tail. Thus, where the limitation was to the first and other sons and their heirs, a gift over in default of such issue was referred to the word heirs, the intention being that the sons were to take in succession. *Lewis d. Ormond v. Waters*, 6 East, 336.

In *Biddulph v. Lees*, 8 E. & B. 289, the intention to give estates tail was apparent from the shifting clause.

After limitations for life.

3. And even though the limitation be to children simply, so that they would only take for life, a gift over in default of such issue will be construed referentially. *Hay v. Earl of Coventry*, 3 T. R. 83; *Denn d. Breddon v. Page*, 3 T. R. 87, n.; 11 East, 603, n.; *Ashley v. Ashley*, 6 Sim. 358; *Bridger v. Ramsay*, 10 Ha. 320; *Re Arnold's Estate*, 33 B. 163.

After limitations giving a first son a life interest only, and the other sons estates tail.

4. On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the Court will lay hold of small circumstances to give the first son also an estate tail.

Thus, in *Evans d. Brooke v. Astley*, 3 Burr. 1569, there was the circumstance that the testator referred to the earlier limitations as including the "parent and his descendants."

In *Clements v. Paske*, 3 Doug. 384, the limitation to the first son was referred by the word "likewise" to other limitations in fee.

And see *Doe d. Harris v. Taylor*, 10 Q. B. 718, which may perhaps be supported on the ground that the words "the elder of such sons and the heirs of his body to take before the younger," applied to the first son as well as to the others. See, however, *Barnacle v. Nightingale*, 14 Sim. 456; and see *Galley v. Barrington*, 2 Bing. 387; *In re Denny's Estate*, I. R. 8 Eq. 427.

Inaccurate use of the word "such."

5. The *prima facie* meaning of the word "such" is to refer the word with which it is coupled to earlier words, so that the latter word is only a compendious statement of the earlier limitations; it may, however, have the converse effect, if there is anything upon the will to show that the testator used the earlier word in the sense of the later; and the word "such" may be rejected, if the term with which it is coupled and that to which it refers are so inconsistent with each other, that the testator cannot

have meant the one as a mere compendious reference to the other. Chap. XL.

Thus, a devise to A. and his heirs, and in default of such issue over would, perhaps, in a will cut down A.'s estate to an estate tail. See *Idle v. Cook*, 1 P. Wms. 70.

And in *Parker v. Tootal*, 11 H. L. 143, where the devise was to Thomas for life, remainder to the first son of the said Thomas in tail male lawfully begotten, severally and successively; and for want of such lawful issue either of Thomas or of James, over, the word such was practically rejected and Thomas took an estate tail.

B. When there is a devise to A. for life, followed by particular limitations in favour of some of his issue, with an ultimate limitation on failure of the issue of A., the question arises whether the intention was to benefit all the issue, notwithstanding the incomplete enumeration of them under the special limitation, in which case, in wills before the Wills Act, the gift over in default of issue will give A. an estate tail, or whether the issue intended to be benefited are sufficiently indicated by the special limitations, in which case the failure of issue will be construed to mean such issue as before mentioned. Gift over in default of issue simply.

1. If the devise is to A. for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A. over, issue means the issue before mentioned, and A.'s estate will not be enlarged. *Foster v. Hayes*, 2 E. & B. 27; 4 E. & B. 717; *Towns v. Wentworth*, 11 Moo. P. C. 526; *Smyth v. Power*, 1 R. 10 Eq. 192; see *Bowen v. Lewis*, 9 App. C. 890. When the prior limitations are to the ancestor for life with remainder to his children in fee or in tail.

And this is the case, though the children included under the prior limitations may be sons only and not daughters, and though the prior estates may be in tail male. *Turke v. Frenchman*, 2 Dyer, 171; 1 And. 8; *Baker v. Tucker*, 11 Ir. Eq. 104; 3 H. L. 106; *Grattan v. Langdale*, 11 L. R. Ir. 473. When the prior limitations include sons only.

*Quere*, whether it makes any difference in the construction of the gift over in default of issue that the ancestor has children living at the date of the devise. See *Doe d. Todd v. Tuesbury*, 8 M. & W. 514, commented on in 4 E. & B. 730.

2. If, however, the prior limitations include less than the whole number of sons the referential construction will not be adopted. Where the prior limitations include

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less than the whole number of sons.

The referential construction is, however, more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. *Sanders v. Ashford*, 28 B. 609.

When the failure of issue is restricted to such failure at the ancestor's death.

3. If the failure of issue is restricted to failure at the death of the parent the referential construction will not be adopted, as it might have the effect of divesting the interests of children who had died before the tenant for life leaving children. *Westwood v. Southey*, 2 Sim. N. S. 192 ; *Ex parte Hooper*, 1 Dr. 264 ; *Re Tookey's Trust*, 21 L. J. Ch. 402 ; *In re Biron*, 1 L. R. Ir. 258.

Gift over in default of issue after a power to appoint to issue by will.

4. If the gift is to A. for life, then to such issue as he should appoint by will and if A. dies without issue over, issue in the gift over is held to refer to the issue before-mentioned, that is to say, issue living at the death of A. *Target v. Gaunt*, 1 P. W. 432 ; *Hockley v. Mawbey*, 1 Ves. jun. 143 ; 3 B. C. C. 82 ; *Leeming v. Sherratt*, 2 Ha. 14 ; *Hanan v. Drew*, 10 Ir. Eq. 333 ; *Eastwood v. Avison*, L. R. 4 Ex. 141.

Where the limitations to issue are contingent.

5. When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. *Doe d. Rew v. Lucraft*, 1 M. & Sc. 573 ; 8 Bing. 386 ; *Franks v. Price*, 6 Sc. 710 ; 5 Bing. N. C. 37 ; 3 B. 182.

Where the children take for life only in wills before the Wills Act.

6. In wills before the Wills Act, where the devise to children is without words of limitation so that they only take estates for life, the referential construction will not be adopted, but the parent will take an estate tail in remainder after the life estates. *Parr v. Swindells*, 4 Russ. 283. *Bennett v. Lowe*, 5 M. & Pay. 485 ; 7 Bing. 535, is not inconsistent with this rule, since the gift over was not upon an indefinite failure of issue ; and *Wight v. Leigh*, 15 Ves. 564, which conflicts with the latter branch of this rule, would probably not now be followed.

C. Similar rules apply to personalty.

Referential construction of gifts over upon death

1. Thus, in a bequest to A. for life and then to his children and if A. dies without issue over, the gift over refers to the failure of the objects of the prior gift. *Doe d. Lyde v. Lyde*,

1 T. R. 593; *Salkeld v. Vernon*, 1 Ed. 64; *Robinson v. Hunt*, Chap. XI. 4 B. 450; *In re Wyndham's Trusts*, L. R. 1 Eq. 290; *In re Sanders' Trusts*, *ib.* 675. without issue in the case of personality.

"If there be no child there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over." *Per* Turner, L. J., *Pride v. Fooks*, 3 De G. & J. 252.

Where family plate was settled on A. for life, with remainder to B. his first son for life, with remainder to B.'s first son absolutely and in the event of B.'s first son dying under twenty-one and without issue to the second and other sons of B. in the same way, and in default of sons of B. similar limitations in favour of the second and other sons of A. absolutely, with an ultimate limitation if there should be no son of A. or B. who should attain twenty-one or die under that age leaving issue, the ultimate gift over took effect, though B. attained twenty-one. *Cardigan v. Curzon Howe*, 9 Eq. 358.

2. Where the prior gifts to the children are not vested so that there may be issue who may not take under them, for instance, children of children who die before the time of vesting, it is less easy to admit the referential construction and it seems that without some further indications to be collected from the will it will not be adopted. *Pride v. Fooks*, 3 De G. & J. 252; *Walker v. Mower*, 16 B. 365. Where the prior gifts to issue are contingent.

And the same is the case where the gifts to the children are only to arise upon a contingency, as for instance, if the legatee marries. *Andree v. Ward*, 1 Russ. 260; *Campbell v. Harding*, 2 R. & M. 390; 2 Cl. & Fin. 431; 8 Bl. N. S. 469.

Under a gift to a tenant for life and then to such children as she should leave at her decease, with a power of appointment to the tenant for life in the event of her death without issue, the referential construction was adopted. *In re Mercer's Trusts*; *Davies v. Mercer*, 4 Ch. D. 182.

3. The referential construction may be assisted by other limitations. See *Malcolm v. Taylor*, 2 R. & M. 416, where this construction was assisted by the devise of the realty. Referential construction assisted by other limitations.

4. And when there is elaborate provision made for the issue of children dying before the time of vesting and born within When the issue of parents dying

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before the  
time of  
vesting are  
provided for.  
Bequest in  
joint tenancy  
to a parent  
and children,  
followed by a  
gift over on  
death without  
issue.

the limits of perpetuity, a gift over in default of issue may very well be referred to the prior limitations. *Ellicombe v. Gompertz*, 3 M. & Cr. 127; *Trickey v. Trickey*, 3 M. & K. 560.

5. The referential construction will not be adopted where the bequest is in joint tenancy to A. and her children, with a gift over in default of issue. In this case the whole is already disposed of, whether children are born or not, and in the absence of some further indication of intention there can be no reason for attempting to make the gift over valid in order to divest absolute interests. *Fisher v. Webster*, 14 Eq. 283.

#### GIFTS OVER UPON DEATH WITHOUT ISSUE BEFORE THE WILLS ACT.

Such words as "dying without issue," or "without leaving," or "having issue" in devises before the Wills Act, are construed to mean an indefinite failure of issue. *Lee's Case*, 1 Leon. 285, pl. 387; *Cole v. Goble*, 13 C. B. 445.

Cases before  
the Wills Act,  
in which gifts  
over on  
failure of  
issue will not  
import an  
indefinite  
failure.

But with regard to personalty, death without *leaving* issue is held to mean leaving issue at the death. And where real and personal estate is devised by the same words, death without leaving issue will import an indefinite failure of issue as regards the realty, but a failure of issue at the death as regards the personalty. *Forth v. Chapman*, 1 P. W. 663; *Bamford v. Chadwick*, 2 W. R. 530.

The failure of issue will, however, be restricted in devises of realty:

Gift over  
upon failure  
of the testa-  
tor's own  
issue.

1. If the ulterior limitations are made to depend upon a failure of issue of the testator and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, such as directions for payment of debts. *Rye's Settlement*, 10 Ha. 106.

It has been said that a devise on failure of the testator's *own* issue, he having none at the time, will in itself be sufficient to show that the testator does not refer to an extinction of issue at any time. The cases, however, quoted in support of the proposition cannot be said to establish the exact point, since in

all of them the devise over was for payment of debts or legacies. Chap XL.

*French v. Caddell*, 3 B. P. C. 257; *Wellington v. Wellington*, 4 Burr. 2165; 1 W. Bl. 645; *Lytton v. Lytton*, 4 B. C. C. 441; *Sanford v. Irby*, 3 B. & Ald. 654.

In *Bagot v. Legge*, 12 W. R. 1097; 4 N. R. 492, it was assumed that a devise upon failure of the testator's issue, though he had none at the time, would have been void for remoteness.

2. If the devise is upon death without issue under twenty-one or over twenty-one, or upon some other event personal to the devisee. *Toovey v. Bassett*, 10 East, 460; *Right v. Day*, 16 East, 67; *Gwynne v. Berry*, I. R. 9 C. L. 494. Death without issue under 21.

The same rule has been applied where the limitations were upon death under twenty-one and without issue. *Glover v. Monckton*, 3 Bing. 13; *Doe d. Johnson v. Johnson*, 8 Ex. 81.

But the rule does not apply where the event is not purely personal to the devisee; for instance, if the gift over is if A. survives B. and dies without issue. *Feakes v. Standley*, 24 B. 485.

3. So, too, with regard to personalty, a gift over if A. dies under twenty-one without issue means issue living at his death. *Pawlet v. Dogget*, 2 Vern. 85; *Martin v. Long*, *ib.* 151; *Morris v. Morris*, 17 B. 198. As regards personalty.

4. Failure of issue is restricted to failure at the death of the parent if the devise is on failure of the issue of A., then "at" or "on" the death of A. over. *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Doe d. King v. Frost*, 3 B. & Ald. 546; *Ex parte Davies*, 2 Sim. N. S. 114; *Parker v. Birks*, 1 K. & J. 156. Gift over at or on the death of the ancestor.

It makes no difference whether A. takes the fee or only a life estate owing to the absence of words of limitation. *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

There seems no reason to doubt that in the case of realty the words "after the death of A." would *prima facie* mean immediately after and have the same restrictive force as they have in the case of personalty. See *Trotter v. Oswald*, 1 Cox. 317. Effect of the word after.

But it may appear from the context that those words were not to have a restrictive force. *Walter v. Drew*, Com. 373; *Jones v. Ryan*, 9 Ir. Eq. 249.

**Chap. XL.** In the same way with regard to personalty, if the gift is if A. die without issue at, on, or after his decease over, the failure of issue means failure at A.'s death. *Pinbury v. Elkin*, 1 P. Wms. 563; *Trotter v. Oswald*, 1 Cox, 317; *Wilkinson v. South*, 7 T. R. 555; *Rackstraw v. Vile*, 1 S. & St. 604; *Hedges v. Harper*, 3 De G. & J. 129.

**Effect of a direction to pay a sum of money upon the decease of the ancestor.** 5. So, too, if a sum of money is to be paid upon the decease of the devisee, upon failure of whose issue the estate is given over, or within a short time afterwards, the failure of issue will not import an indefinite failure. *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Doe d. King v. Frost*, 3 B. & Ald. 546; *Nichols v. Hooper*, 1 P. W. 198; 2 Vern. 686; *Blinston v. Warburton*, 2 K. & J. 400; *Rye's Settlement*, 10 Ha. 106. Perhaps *Keily v. Fowler*, 6 B. P. C. 309; Wilm. 298, comes under this head.

**Gift over in default of issue to persons "then living."** 6. A gift over upon failure of issue to persons "then living," the persons being such as must be ascertained within the limits of perpetuity, will not be construed to mean an indefinite failure of issue. *Murray v. Addenbrook*, 4 Russ. 407; *Greenwood v. Verdon*, 1 K. & J. 74.

In such cases the failure of issue contemplated is not a failure at the death of the ancestor, but at any time during the lives of the legatees to take under the gift over. Cases *supra cit.*, and *Crowder v. Stone*, 3 Russ. 217; and see *Jarman v. Vye*, L. R. 2 Eq. 784.

**Candy v. Campbell.** In *Candy v. Campbell*, 8 Bl. N. S. 469; 2 Cl. & F. 421, a gift in default of issue to the testator's nephews and nieces who might be living at the time, was held void for remoteness. In this case the nephews and nieces may not all have been born at the testator's death, the donees therefore would not have been ascertained within the limits of perpetuity.

In *Gee v. Audley*, 1 Cox, 324, the point does not appear to have been raised whether the failure of issue could be restricted to the lives of the persons to take under the gift over.

Of course, where the class to whom the property is given on failure of issue would include persons coming into being at any time before the failure of issue takes place, there is no reason for restricting the failure of issue. *Webster v. Parr*, 26 B. 236.

In the same way, where the class, to whom the gift is made upon failure of issue, is not to be ascertained at the time when the failure happens, but upon some collateral event; if, for instance, the gift is upon failure of issue to the children of my brothers living at the death of my last child, so that the class to take is ascertained at a different time from the period of possession, there is no reason for restraining the failure of issue, since children may take transmissible interests without surviving the failure of issue. *Garrett v. Cockerell*, 1 Y. & C. C. 494.

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Gift in default of issue to a class ascertainable upon some collateral event.

7. It would seem that the same principle ought to apply where the gift is to several, and if any die without issue to the survivors.

Gift in default of issue to survivors.

Therefore, in such a case, if survivors means those who survive the failure of issue, the failure of issue can only import a restricted failure. The cases, however, seem to show that a mere gift if any die without issue to the survivors without more would be sufficient to restrict the failure of issue to the death of the parent. *Hughes v. Sayer*, 1 P. Wms. 534; *Ranelagh v. Ranelagh*, 2 M. & K. 441; *Westwood v. Southey*, 2 Sim. N. S. 192; *Turner v. Frampton*, 2 Coll. 331.

When survivorship refers to the failure of issue.

But if survivor means not the person surviving the failure of issue but the longest liver of the legatees, so that one legatee surviving another would take a transmissible interest before the failure of issue, the failure of issue will not be restricted. *Chadock v. Cowley*, Cro. Jac. 695.

When survivorship is merely among the legatees.

It is submitted that, where the meaning of survivors is clear, words of limitation superadded are immaterial; but where it is doubtful whether the survivorship contemplated is between the legatees or is to be referred to the period of failure of issue, words of limitation superadded afford a strong argument that the former was intended. *Massey v. Hudson*, 2 Mer. 130; *O'Donohoe v. King*, 8 Ir. Eq. 185.

Effect of words of limitation.

Upon the same principle, in all those cases where survivors would be read others, or there is an intention to benefit not merely the persons who survive the failure of issue, but their stirpes, the failure of issue will not be restricted. *Roe v. Scott*, *Fearne*, C. R. 473, n; *Taylor v. Walker*, 13 W. R. 986;

When survivorship is referrible to the stirpes.

**Chap. XL.** *Assignees of Leadbeater*, I. R. 8 Eq. 422; see, too, *McClenaghan v. Bankhead*, I. R. 8 C. L. 195.

Gift over in default of issue to a named person.

8. There is no authority for saying that a gift on failure of issue to A., a definite named person without more, would have the effect of restricting the failure of issue. *Lord Beauclerk v. Dormer*, 2 Atk. 307; *Barlow v. Salter*, 17 Ves. 479; see *Fearne*, C. R. 481.

Intention to confer personal enjoyment.

On the other hand, a gift in default of issue of A. to two persons, or such of them as should be then living, has been held sufficient to show that the testator meant a personal enjoyment by the legatees and could not therefore have intended a general failure of issue. *Wilson v. Chesnut*, I. R. 1 Eq. 559. Perhaps *Roe d. Sheers v. Jeffery*, 7 T. R. 589, may stand on this ground.

*Jones v. Cullimore*, 3 Jur. N. S. 404, where the gift was on failure of issue to such of my children as may be then living, and if none should be then alive to a person named and a class, must probably be supported on the ground that the testator showed by the gift to children then living that he did not intend an indefinite failure of issue, and not on the ground that the ultimate gift was to a definite person.

Where the subsequent estates are all for life.

9. Perhaps failure of issue would be restricted if the subsequent estates are all given to living persons for life only. *Roe d. Sheers v. Jeffery*, 7 T. R. 589; see *Trafford v. Boehm*, 3 Atk. 440.

Where the estate is *pur autre vie*.

10. If the estate devised is *pur autre vie* a limitation over in default of issue is good, since it cannot be held to mean a failure, which might take place after the determination of the estate. *Croly v. Croly*, Batty, 1; *Manning v. Moore*, Alc. & Nap. 96; *Lee v. Flinn*, *ib.* 418.

Devise on a general failure of issue of a reversion dependent on failure of certain lines of issue.

11. If the property devised is a reversion which comes into possession only after the failure of issue of some person, a devise of such reversion after failure of the issue in question is in effect an immediate devise of the reversion and therefore valid. And even if the event upon which the reversion is expressed to be devised is larger than and includes the event upon which it comes into possession, the devise will be good if in effect the two events are the same, and the intention is merely to devise the reversion. If, for instance, the reversion falls into possession

on failure of issue by a particular wife of the testator and the testator devises it upon a general failure of issue, the devise is good, as the birth of issue by a second marriage would revoke the will. *Jones v. Morgan*, Fearn, C. R. App. 577; 3 B. P. C. 322; *Lytton v. Lytton*, 4 Bro. C. C. 441.

In the same way, if the testator erroneously recites that he is entitled to the reversion of certain estates on the death of a son without issue generally, and then devises the reversion on failure of such issue, the devise is good, the intention being clear to devise the reversion. *Lewis v. Templar*, 33 B. 625; see *Bankes v. Holme*, 1 Russ. 394, *n*.

But a mere devise of a reversion upon a failure of a larger class of issue than that upon which it is limited, will not operate as an immediate devise of the reversion. *Lady Lanesborough v. Fox*, Cas. temp. Talb. 262.

## CHAPTER XLI.

## SHIFTING CLAUSES.

**Chap. XLI.**

WHERE estates are given by will, and there is a clause shifting the lands if the devisee comes into possession of estates previously settled, the estates go over if the event happens. *Cope v. Earl de la Warr*, 8 Ch. 982.

Life estate coming into possession in event upon which the shifting clause is to take effect.

And the shifting clause will operate upon the life interest of a tenant for life, though his interest is such, that if he comes into possession of the settled estates, his life interest under the will must at the same time come into possession; so that, in effect, the gift of the life interest is nugatory. *Lambarde v. Peach*, 4 Dr. 553; 1 D. F. & J. 495.

Possession of settled estates *primâ facie* refers to possession under the settlement.

When estates devised by will are directed to shift on the devisee coming into possession of settled estates, the presumption is that the testator means a possession under the settlement; and, therefore, if the devisee comes into possession of the settled estates not under the settlement, but under an entirely new title, for instance, under the will of a tenant in tail, who had barred the entail, the shifting clause will not take effect. *Taylor v. Earl of Harewood*, 3 Ha. 372; *Wandesforde v. Carrick*, I. R. 5 Eq. 486.

*A fortiori*, where the shifting clause is to take effect on the devisee becoming entitled to other estates under any existing or future will or settlement and he becomes entitled by descent from his father, though the latter took under a will, the devised estates will not shift. *Walmsley v. Gerard*, 29 B. 321.

Meaning of "entitled."

The term entitled would in such a clause mean entitled in possession. *Umbers v. Jaggard*, 9 Eq. 200; see *Gryll's Trusts*, 6 Eq. 589; *In re Finch*; *Abbiss v. Burney*, 28 W. R. 903.

If the devisee takes the settled estates not under the settlement existing at the date of the will, but under a resettlement, which can be looked upon as a continuation of the old title, the devisee taking the same interest under the resettlement as he would have taken under the old settlement, except so far as his interest has been diminished for his own benefit, the shifting clause takes effect. *Harrison v. Round*, 2 D. M. & G. 190; see *In re Croker's Estate*, I. R. 2 Eq. 58; *Wright v. Marshall*, 51 L. T. 781.

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Whether a devisee taking settled estates under a resettlement is within a shifting clause.

If the devisee takes under the resettlement a diminished interest in the settled estates or the estates themselves are diminished in quantity, the shifting clause has no effect. *Fazakerley v. Ford*, 4 Sim. 390; see 3 A. & E. 897; *Gardiner v. Jellicoe*, 12 C. B. N. S. 568; *Meyrick v. Laws*, 9 Ch. 237.

On the other hand, if the testator expressly gives directions to have a portion of the settled estates settled to other uses, the devolution of the settled estates to the devisee diminished by that portion will not prevent the operation of the shifting clause. *Micklethwait v. Micklethwait*, 4 C. B. N. S. 790; and see *Stacpoole v. Stacpoole*, 2 Con. & Law. 489, 501.

The shifting clause will not, in the absence of a clear intention, take effect where the devisee has only an interest in remainder in the settled estates. *Monypenny v. Dering*, 2 D. M. & G. 145; *Curzon v. Curzon*, 1 Giff. 248; *Bagott v. Legge*, 34 L. J. Ch. 156; 12 W. R. 1097.

As to the repeated operation of a shifting clause, see *Doe d. Lumley v. Earl of Scarborough*, 3 A. & E. 2, 897; *Monypenny v. Dering*, 2 D. M. & G. 145.

It seems a shifting clause would not avoid jointures and portions properly charged upon the estates previous to their shifting. *Holmesdale v. West*, 12 Eq. 280.

Where an estate devised by will is directed upon the devolution of settled estates to the devisee to go over to the next remainder-man, as if the tenant for life were dead, the estate will shift to trustees, to preserve contingent remainders where there are contingent remainders to unborn sons of the tenant for life whose life estate has ceased; though, strictly speaking, if the tenant for life were dead, the estate of the trustees to

In what cases estates directed to shift to the next remainder-man will go to the trustees to preserve.

**Chap. XLI.** preserve would also be at an end. *Doe v. Heneage*, 4 T. R. 13; see the opinion of Fearne, C. R. App. No. 6; *Stanley v. Stanley*, 16 Ves. 491; *Morrice v. Langham*, 11 Sim. 260; 12 Sim. 615; and see 11 Cl. & F. 667; *Lambarde v. Turton*, 4 Dr. 553; 1 D. F. & J. 495; see *Lord Kenlis v. Earl of Bective*, 34 B. 587.

Who is entitled to the intermediate rents.

As to whether the heir or remainder-man is entitled to the rents during the period between the shifting of the estate to the trustees and the birth of issue to take, it seems that a direction that the rents may be applied for the maintenance of a remainder-man even during the lifetime of a tenant for life, would be sufficient to show that the rents were not to go to the heir. *Turton v. Lambarde*, 1 D. F. & J. 495 (judgment of the L. J. Turner); *D'Eyncourt v. Gregory*, 34 B. 36.

On the other hand, in the absence of some such intention, they would go to the heir. *Stanley v. Stanley*, 16 Ves. 491; and see *per* Kindersley, V.-C., *Lambarde v. Peach*, 4 Dr. 553.

Estate directed to shift as if the devisee were dead without issue.

When the devised estate is directed to go over, as if the person becoming entitled to the settled estates were dead without issue, the next remainder-man takes on the event happening. *Morrice v. Langham*, 8 M. & W. 194.

In such case trustees to preserve will not take.

And in such a case, if the next limitations in remainder are contingent, the estates will not go to trustees to preserve contingent remainders during the life of the person from whom the estate is shifted, since their estate would in any event be inadequate to support contingent remainders limited upon a failure of issue of such person after his death. *Carr v. Earl of Errol*, 6 East, 58.

When the devised estates are directed to go to the next remainder-man, as if the person taking the benefit upon the accruer of which the estate is to shift were dead without issue, the construction will not be influenced by the fact that the younger children of the person from whom the estates shift may happen to take no benefit under the settlement. *Doe v. Earl of Scarborough*, 3 Ad. & E. 1.

Issue limited to issue capable of taking under the limitation

But where estates were devised to several sons successively in tail male, with remainder to the children of the sons in tail general, with remainder over, and the estates were directed to

go over upon the acquisition of settled estates (which could not go to any female issue of the testator's sons), as if the person taking the settled estates were dead without issue, the words "without issue" were confined to issue capable of taking under the limitations of the devised estate preceding the next remainder. *Gardiner v. Jellicoe*, 12 C. B. N. S. 568; 11 H. L. 323. Chap. XII.  
of the devised  
estate pre-  
ceding the  
next re-  
mainder.

## CHAPTER XLII.

## GIFTS BY REFERENCE.

**Chap. XLII.** A BEQUEST of chattels to a person and his heirs or successors to go according to the limitations of real estate or as heirlooms vests absolutely in the person named, whether such words as "so far as the rules of law and equity permit," or "to be enjoyed and go with the title," are added or not. The Court, in fact, refuses to treat such a bequest as executory. *Rowland v. Morgan*, 6 Ha. 463; 2 Ph. 764; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

Chattels given to a person to go as heirlooms.

The cases of *Gower v. Grosvenor*, Barn. 54; 5 Mad. 337, and *Trafford v. Trafford*, 3 Atk. 347, so far as they express a contrary opinion, are overruled.

Chattels to go with a title.

In the same way a gift of chattels to such persons as should from time to time be the holders of a title, so far as the rules of law permit, vests absolutely in the first holder of the title after the testator's death, though he may have been born at the testator's death, and could, therefore, have been cut down to a life interest. *Tollemache v. Coventry*, 2 Cl. & F. 611; 8 Bli. N. S. 547; *In re Viscount Exmouth*; *Exmouth v. Praed*, 23 Ch. D. 158.

Chattels to go as heirlooms with realty.

A gift of personalty as heirlooms to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not. *Trafford v. Trafford*, 3 Atk. 347; *Vaughan v. Burslem*, 3 Bro. C. C. 101; *Foley v. Burnell*, 1 B. C. C. 274; 4 B. P. C. 319; *Carr v. Lord Erroll*, 14 Ves.

478; *Lord Scarsdale v. Curzon*, 1 J. & H. 40; *In re Johnson's Trust*, L. R. 2 Eq. 716; see *Miller v. Stanley*, 12 W. R. 780. Chap. XLII.

But the chattels will not vest in a tenant in tail whose estate is liable to be divested by the birth of issue to take under prior limitations and who dies before his estate becomes indefeasibly vested. *Hogg v. Jones*, 32 B. 45.

A direction that the personalty is not to vest in a tenant in tail dying under twenty-one will be construed as referring to a tenant in tail by purchase under the will, and will prevent the personalty from vesting in a tenant in tail by purchase dying an infant. *Christie v. Gosling*, L. R. 1 H. L. 279; *Harrington v. Harrington*, L. R. 5 H. L. 87. Direction against vesting under 21.

If the direction is that a tenant in tail in possession who dies under twenty-one shall not be entitled to the personalty, but that the personalty shall belong only to such person as shall first attain twenty-one and become entitled to an estate tail in possession in the real estate, the words "in possession" will not be strictly construed; but if a first tenant in tail in remainder dies under twenty-one, the personalty will vest in the next tenant in tail in remainder who attains twenty-one. *Foley v. Burnell*, 1 B. C. C. 274; 4 B. P. C. 319; *Martelli v. Holloway*, L. R. 5 H. L. 532. Direction as to possession.

If the gift of the chattels is to the person actually seised at the death of tenants for life, or to the person seised of the actual freehold which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded. *Potts v. Potts*, 3 J. & Lat. 353; 9 Ir. E. 577; 1 H. L. 671; *Lord Scarsdale v. Curzon*, 1 J. & H. 40; see *Cox v. Sutton*, 25 L. J. Ch. 845. Reference to actual possession.

In such a case, if the tenant for life and the first tenant in tail bar the entail, but the first tenant in tail dies before the tenant for life, the chattels go to the person who would have come into possession if the estate tail had not been barred. *Hogg v. Jones*, 32 B. 45.

A declaration that no person in existence at the testator's death or born in due time afterwards should have more than a life interest in the chattels, and so that no person should acquire an absolute interest till the expiration of twenty-one years Proviso divesting estate must not be uncertain.

Chap. XLII. after the decease of all persons in existence at the testator's death and afterwards attaining the title, was held to be void for uncertainty. *In re Viscount Exmouth; Exmouth v. Praed*, 23 Ch. D. 158.

Where chattels are given to the person or persons in actual possession of land, to go as far as the rules of law and equity permit, but so as not to vest in any person becoming entitled to an estate of inheritance who dies under twenty-one, and the first tenant in tail in possession dies under twenty-one, it seems doubtful whether the chattels are carried on to the next owner within the limits of perpetuity, or whether there would be a lapse. See the opinion of Lord Cairns in favour of an intestacy, and of Lord Westbury in favour of the transmission of the property within the limits of perpetuity, in *Harrington v. Harrington*, L. R. 3 Ch. 564; *ib.* 5 H. L. 87.

Possession  
under a deed  
not executed.

A gift of chattels to the person entitled under a deed of entail to the possession of a house where the deed referred to had never been executed was held to pass to the person in fact in possession of the house. *In re Marquess of Bute; Marquess of Bute v. Ryder*, 27 Ch. D. 197.

Bequests "in  
the same  
manner" as  
prior be-  
quests.

When a bequest has been made to several persons as tenants in common for life with remainder to their children and there is a subsequent gift to the same persons *in the same manner* as the prior bequest, the second bequest will be subject to the same limitations for life and remainders over. *Milsom v. Awdrey*, 5 Ves. 465; *Eumes v. Anstee*, 33 B. 264; *Smith v. Greenhill*, 14 W. R. 912; *Giles v. Melsom*, L. R. 6 H. L. 24.

In *Sweeting v. Prideaux*, 2 Ch. D. 413, a subsequent gift for the life of the legatee only "in the same manner in every respect and subject to the same control" as the prior gift, was held on the language of the will to import the limitation in remainder of the prior gift to the children of the legatee. See *Auldjo v. Wallace*, 31 B. 193; *Re Smith; Bushford v. Chaplin*, 45 L. T. 247.

If, however, the original gift is directed to fall into the residue in default of children and the residue is then given to the same persons "in the same manner," these words will be referred, if

possible, to a tenancy in common or separate use. *Shanley v. Baker*, 4 Ves. 731. Chap. XLII.

And where the original gifts are absolute, subject to executory gifts over, a subsequent gift to be held "in the same manner" as the prior gift will not import the executory gifts over if the words can be referred to a tenancy in common. *Lumley v. Robbins*, 10 Ha. 621; and see *Hare v. Hare*, 24 W. R. 575.

The referential words may, however, be strong enough to import all the limitations and restrictions of the preceding gift. *Ross v. Ross*, 2 Coll. 269; *Re Colahead*, 2 De G. & J. 690; *Re Shirley's Trusts*, 32 B. 394; *Ord v. Ord*, L. R. 2 Eq. 393. Gift by reference may import all the limitations of a prior gift.

When there is a gift to a class of persons living at a particular time, and a subsequent gift to the same class without the restriction of being alive at the particular time, "in the same manner" as the prior gift, this will not cut down the class to take the second gift. *Yardley v. Yardley*, 26 B. 38; *Piggott v. Wildes*, 26 B. 90; *Re Wilder's Trusts*, 27 B. 418.

But there may be words which will have this effect. *Swift v. Swift*, 11 W. R. 334; 32 L. J. Ch. 479.

For the construction of a gift upon the trusts of a settlement under which appointments with hotchpot clauses had been made, see *Smyth-Pigott v. Smyth-Pigott*, W. N. 1884, 149.

When property is given upon the same trusts as other property which is subject to a power to raise a definite sum, the property so given by reference is not subject to an additional charge of the same amount. *Hindle v. Taylor*, 5 D. M. & G. 577, 599; *Boyd v. Boyd*, 9 L. T. N. S. 166; 2 N. R. 486; *Baskett v. Lodge*, 23 B. 138; see *Sambourne v. Barry*, I. R. 11 Eq. 140. Reduplication of charges.

But if the power is to raise a charge not exceeding a certain proportion of the value of the property, the power to charge is increased in proportion by the value of the added property. *Cooper v. Macdonald*, 16 Eq. 258.

It may be noticed that a bequest to persons "before named" may refer to persons before mentioned, and will not without more be confined to persons expressly mentioned by name. *In re Holmes*, 1 Dr. 321; *Bromley v. Wright*, 7 Ha. 334. Gift to persons "before named."

## CHAPTER XLIII.

## EXECUTORY TRUSTS.

Chap. XLIII.

Executory trusts defined.

EVERY trust which requires a future conveyance or settlement is so far executory; but the mere fact that the testator contemplates a future settlement will not justify the Court in putting upon the words of a testator any other than their legal meaning.

When the testator, though contemplating the execution of a future instrument, declares the trusts upon which the property is to be held by reference to another instrument, those trusts are looked upon as incorporated into the will and must have their ordinary legal meaning. *Christie v. Gosling*, L. R. 1 H. L. 279; see *Viscount Holmesdale v. West*, L. R. 3 Eq. 474.

If the testator himself declares the trusts to be inserted in the contemplated settlement, the question then is, "whether he has been his own conveyancer," in which case the trusts declared by him must be literally followed, or whether the trusts declared by him are merely the headings of a future settlement, in which case they will be so carried out as to effectuate his intention. See *Egerton v. Earl of Brownlow*, 4 H. L. 1, 210; *Austen v. Taylor*, 1 Ed. 361; Amb. 376; *Boswell v. Dillon*, Dru. temp. Sug. 291; *In re Nelley's Trusts*, 26 W. R. 88.

Thus a direction to purchase lands to be held on the trusts declared with respect to other lands must be obeyed by literally adopting those trusts. *Austen v. Taylor*, 1 Ed. 361; Amb. 376.

Distinction between marriage articles and wills.

In marriage articles the purpose of the instrument is itself sufficient to indicate the settlor's intention that the property is to go in strict settlement, but in a will an intention that words

are not to have their strict meaning must appear from the instrument itself. Therefore, though the trust is executory, a direction to settle property on A. and the heirs of his body: *Seale v. Seale*, 1 P. W. 291; *Samuel v. Samuel*, 14 L. J. Ch. 222; 9 Jur. 222; or a devise in trust for A., with a direction to make a proper entail to the male heir by him, will not cut down A. to less than an estate tail. *Blackburne v. Stables*, 2 V. & B. 367; *Sweetapple v. Bindon*, 2 Vern. 536; *Harrison v. Naylor*, 2 Cox, 247; *Randall v. Daniell*, 24 B. 193; *Marshall v. Bousfield*, 2 Mad. 166; and see *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; *Lowry v. Lowry*, 13 L. R. Ir. 317.

If, however, an intention is manifested not to use words in their strict legal sense, the trust will be executed so as to effect the general intention.

How far the rule in Shelley's case applies to executory trusts.

Such an intention is sufficiently indicated if the limitation is to A. for life, remainder to his heirs: *Meure v. Meure*, 2 Atk. 265; *Papillon v. Voice*, 2 P. Wms. 471; *Stonor v. Curwen*, 5 Sim. 264; *Hadwen v. Hadwen*, 23 B. 551; *Bastard v. Proby*, 2 Cox, 6; *Rochfort v. Fitzmaurice*, 2 D. & War. 1; *Trevor v. Trevor*, 1 H. L. 239; by a direction that the first taker should be unimpeachable for waste: *Papillon v. Voice*, 2 P. Wms. 471; *Fearne*, C. R. 115; by a direction that he shall not have power to bar the entail: *Leonard v. Earl of Sussex*, 2 Vern. 526; *Fearne*, C. R. 115; or that the property shall go over if the first taker dies without issue: *Shelton v. Watson*, 16 Sim. 543; *Thompson v. Fisher*, 10 Eq. 207; by the insertion of a general limitation to preserve contingent remainders not limited to a life: *Venables v. Morris*, 7 T. R. 342, 438; *Doe v. Hicks*, 7 T. R. 433; by a direction that a settlement shall be made as counsel shall advise and that issue are to take in succession, and according to priority. *White v. Carter*, 2 Ed. 366.

And the same result, it seems, will follow if the general scope of the limitations shows that they were not to be literally adhered to. *Parker v. Bolton*, 5 L. J. Ch. 98; *Duncan v. Bluett*, 1 R. 4 Eq. 469.

As to the effect of a direction to make a strict entail, see *Graves v. Hicks*, 11 Sim. 536; *Sealey v. Stawell*, 1 R. 2 Eq. 326.

Direction to make a strict entail.

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Direction to settle property to go with a title.

An executory trust to settle property upon such trusts as would correspond with the limitations of a barony granted by letters patent to several persons in succession and the heirs male of their bodies respectively, will be limited so as to give them only estates for life, the title being inalienable. *Sackville-West v. Viscount Holmesdale*, L. R. 3 Eq. 474; *ib.* 4 H. L. 543; *Lord Dorchester v. Earl of Effingham*, Sir G. Coop. 319; 10 Sim. 587, n.; 3 B. 180, n.; *Woolmore v. Burrows*, 1 Sim. 512; *Banks v. Baroness Le Despencer*, 10 Sim. 576.

The words "as far as the rules of law permit" will not make a trust executory.

It is clear that where chattels are directed to go as heirlooms, with real estate "as far as the rules of law and equity permit," these words will not make the trust executory, or enable the Court to mould the limitations of the personalty. *Christie v. Gosling*, L. R. 1 H. L. 279; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

Effect of such words where the trust is executory.

But if such a trust is executory the Court will mould it so as to prevent the absolute vesting of chattels in a tenant in tail dying before coming into possession. See *Lady Lincoln v. Duke of Newcastle*, 12 Ves. 226, and see per Lord Chelmsford in *Christie v. Gosling*, L. R. 1 H. L. 290; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543; see *Montagu v. Lord Inchiquin*, 23 W. R. 592.

If there are shifting clauses as to the realty which would be void for remoteness as to the personalty, they will be moulded so as to carry out the intention. *Miles v. Harford*, 12 Ch. D. 691.

The Court will carry out in strict settlement an executory trust of family jewels directed to go as heirlooms to a succession of eldest sons "as far as the rules of law and equity will permit," though unconnected with limitations of real estate, and will insert provisoes against vesting in any person who does not become entitled to possession and attain twenty-one. *Shelley v. Shelley*, 6 Eq. 540.

Direction to settle.

A gift to a female legatee, followed by a direction to settle it on her upon marriage, probably imports no more than a separate use, so that the legatee, whether married or not, is entitled to payment on her separate receipt. *Laing v. Laing*, 10 Sim. 315. *Magrath v. Morehead*, 12 Eq. 491. See *Kennerley v. Kennerley*, 10 Ha. 160; *Munt v. Glymes*, 41 L. J. Ch. 639.

If the direction is to make a *strict* settlement, but no intention is shown to benefit children, the property will be settled upon the legatee in such a way as to exclude her husband and children. *Lock v. Bagley*, 4 Eq. 122. Chap. XLIII.  
Direction to settle strictly.

But a direction to settle a legacy upon the legatee by her settlement has been held to import the usual trusts of a marriage settlement, including trusts for children. *Duckett v. Thompson*, 11 L. R. Ir. 424.

If an intention is shown that the children of the legatee are to be benefited, the settlement will contain a power of appointment in the legatee with limitations in default of appointment in favour of children who, being males, attain twenty-one, or being females, attain twenty-one or marry as tenants in common. *Young v. Macintosh*, 13 Sim. 445; *Stanley v. Jackman*, 23 B. 450; *Taggart v. Taggart*, 1 Sch. & L. 84; *Cogan v. Duffield*, 2 Ch. D. 44; see *Oliver v. Oliver*, 10 Ch. D. 765; *Eustace v. Robinson*, 7 L. R. Ir. 83; *Gowan v. Gowan*, 50 L. J. Ch. 248. Intention to benefit children.

Where there is an intention to benefit a husband or wife, the husband and wife will take a joint power of appointment. *In re Gowan*; *Gowan v. Gowan*, 17 Ch. D. 778.

If the trustees have a discretion as to the form of settlement a power may be inserted enabling the legatee to appoint a life interest to a husband. *Charlton v. Rendall*, 11 Ha. 296.

Under a direction to settle for the benefit of the legatee and her issue to the exclusion of a husband, the ultimate trusts will be for the appointees of the legatee by will and in default of appointment for her absolutely. *Stanley v. Jackman*, 23 B. 450. Ultimate trusts.

A covenant in executory marriage articles to settle real estate on issue will be carried out by successive limitations to the first and other sons, and so on. *Dod v. Dod*, Amb. 274; *Hart v. Middlehurst*, 3 Atk. 373; *Phillips v. James*, 13 W. R. 934; *In re Grier*, I. R. 6 Eq. 386.

In the execution of executory trusts by the Court the question arises whether the tenants for life are to be dispunishable for waste or not. In what cases tenants for life will be unimpeachable for waste.

1. Where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an

**Chap. XLIII.** estate for life, the life estates are made unimpeachable for waste. *Leonard v. Earl of Sussex*, 2 Vern. 526; *White v. Briggs*, 15 Sim. 17; 2 Ph. 583.

And, therefore, where estates are directed to go to the support of a title granted to a man and the heirs of the body, the estate of the first taker being cut down to a life estate in execution of the trust, will be dispunishable for waste. *Woolmore v. Burroughes*, 1 Sim. 512; *Bankes v. Le Despencer*, 10 Sim. 576; 11 Sim. 508; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 548.

A direction that the trust is to be executed in strict settlement without more, *i.e.*, where no estate for life is expressly given, implies that the estates for life are to be dispunishable for waste. See *Davenport v. Davenport*, 1 H. & M. 775.

And, upon the same principle, if the trust is to be executed in strict settlement, powers which would diminish the estate will not be inserted under a direction to insert the usual powers. *Higginson v. Barneby*, 2 S. & St. 516; see *Sackville-West v. Viscount Holmesdale*, *supra*.

2. But if the testator has expressly, or by reference to other trusts, directed a life estate to be given, the power to commit waste will not be added to the life estate. *Davenport v. Davenport*, 1 H. & M. 775.

And if life estates are directed by the testator to be given, the words "in strict settlement" will not make the life estates dispunishable for waste. *Stanley v. Coulthurst*, 10 Eq. 259.

A direction to settle without power of anticipation is inconsistent with a power to commit waste. *Clive v. Clive*, 7 Ch. 433.

Restraint  
upon antici-  
pation.

Property to be settled to the separate use of a married woman will be settled with a restraint upon anticipation. *Turner v. Sargent*, 17 B. 515; *Stanley v. Jackman*, 23 B. 450; *Re Dunnill's Will*, 1 R. 6 Eq. 322; see *Symonds v. Wilkes*, 11 Jur. N. S. 659.

Real estate directed to be settled will be settled as realty. *Turner v. Sargent*, 17 B. 515.

What powers  
will be in-  
serted in a

A simple direction to settle will, it seems, authorise the insertion of powers of management, such as powers of leasing,

and sale and exchange. *Turner v. Sargent*, 17 B. 514; *Wise v. Piper*, 13 Ch. D. 848. Chap. XLIII.

And where "usual powers" are expressly authorised, powers of leasing, of sale and exchange, and, if necessary, of partition and of leasing mines and granting building leases, will be inserted, but not powers to confer personal privileges upon particular persons. *Peake v. Penlington*, 2 V. & B. 311; *Hill v. Hill*, 6 Sim. 136; see *Duke of Bedford v. Marquis of Abercorn*, 1 M. & Cr. 312, p. 334; *Higginson v. Barneby*, 2 S. & St. 516; *In re Grier*, I. R. 6 Eq. 386.

settlement  
executed by  
the Court.

Where certain powers are given to tenants for life if qualified, and if not qualified, to trustees for them, general words will not authorise powers of sale and exchange. *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 437.

And where certain powers are given, general words will, as a rule, authorise only powers of a like nature; they will not, for instance, authorise the insertion of a power to grant building leases when a power to lease is expressly given. *Pearse v. Baron*, Jac. 158.

The general words may, however, be so placed as to show that their generality is not to be controlled. *Lindon v. Fleetwood*, 6 Sim. 152.

## CHAPTER XLIV.

## IMPLICATION.

## IMPLICATION OF ESTATES TAIL.

**Chap. XLIV.** If there is a devise to A. simply, or to A. for life, followed by a gift over in default of issue, if these words import an indefinite failure of issue, A. takes an estate tail. *Machell v. Weeding*, 8 Sim. 4; *Daintry v. Daintry*, 6 T. R. 307; *In re Banks' Trusts*, 2 K. & J. 387.

The Court will not constructively limit the failure of issue, so as to prevent the implication of an estate tail.

And in wills before the Wills Act, if the limitation is to A. simply, or to A. for life, with a gift over in default of issue, A. will take an estate tail, though there are words which might constructively limit the failure of issue within a definite period, since this is the only construction which will carry anything to the issue. *Wyld v. Lewis*, 1 Atk. 432; *Simmons v. Simmons*, 8 Sim. 22 (where the devise was in effect to A. for life, and if she dies without issue over, the power to appoint to issue being merely discretionary); *Butt v. Thomas*, 11 Ex. 235; 1 H. & N. 109.

Whether an estate tail will be implied from a gift over in default of a person who takes nothing under the will.

*Quære* whether an estate tail will be implied in a person, from a gift over in default of his issue simply, where no interest is given to him by the will. *Parker v. Tootal*, 11 H. L. 143; see *Walter v. Drew*, Com. Rep. 373.

And where, in a devise to A. for life, remainder to his children either for life or in tail, an estate tail is implied in A. from a gift over in default of issue, the estate tail so implied will be in remainder, to take effect after the prior estates expressly limited. *Doe d. Bean v. Halley*, 8 T. R. 5; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; 3 Ad. & E. 340; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93; *Andrew v. Andrew*, 1 Ch. D. 410.

And where an estate tail is to be implied either in an ancestor or his issue, it will be implied in the ancestor, so as to take in the whole line of issue. *Atkinson v. Barton*, 10 H. L. 213; *Forsbrook v. Forsbrook*, *supra*.

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As between father and son, an estate tail will be implied in the father.

# IMPLICATION OF LIFE ESTATES.

I. If there is a devise of realty to the heir-at-law after the death of A., A. will take an estate for life by implication. It is evident that the heir who would take in case of intestacy is not meant to take immediately, and the only way of carrying out the testator's intention is to give A. a life estate. "A. must have the thing devised or none else can have it." *Gardner v. Sheldon*, Vaughan, 259; Tudor, L. C. 625:

Devise to the heir-at-law after the death of A., gives A. a life estate.

But a devise to a stranger after the death of A. gives A. no estate by implication, since the heir-at-law may have been intended to take in the meantime. *Aspinall v. Petvin*, 1 S. & St. 544.

In order that A. may take a life estate the person to whom the lands are given after the death of A. must be the heir-at-law at the time of the devise, and not at the time when the devise takes effect. *Aspinall v. Petvin*, *supra*.

Person to take on the death of A. must be heir at date of devise.

Similarly, a devise to one of several coheirresses after the death of A. gives A. a life estate. *Hutton v. Simpson*, 2 Vern. 723, as stated in *King v. Ringstead*, 9 B. & C. 218, p. 228; see *Rhodes v. Rhodes*, 7 App. C. 192.

Devise at the death of A. to one of several coheirresses.

The rule does not apply where the devise is to the heir and others after the death of A. *Ralph v. Carrick*, 11 Ch. D. 873.

Devise at the death of A. to the heir and others.

The express gift of certain lands to A. does not in itself prevent him from taking other lands by implication. See 13 H. 7, f. 17; Brook, Devise, pl. 52, cited in *Gardner v. Sheldon*, Vaughan, 259; Tudor, L. C. 625, 631.

Whether an express devise to A. will prevent him from taking by implication.

Therefore, where lands are devised to A. for life, and after the death of A. the lands previously devised, together with other lands, are devised to B., A. will or will not take an estate for life by implication in the other lands, according as B. is the heir

Chap. XLIV. or a stranger. *Aspinall v. Petvin*, 1 S. & St. 544; *King v. Ringstead*, 9 B. & C. 218; *Attwater v. Attwater*, 18 B. 330.

Distributive construction where lands, in some of which A. takes a life estate, are given at his death to the heir.

But words which taken in their grammatical sense are joint and apply to the two classes of property, will be construed distributively if the intention of the testator is manifest that the lands not expressly devised for life are to go to the devisees at once. *Cook v. Gerard*, 1 Saund. 183, cit. 9 B. & C. 225; *Simpson v. Hornsby*, 2 Vern. 723; Prec. Ch. 439, 452; *Doe v. Brazier*, 5 B. & Ald. 64; see *Rhodes v. Rhodes*, 7 App. C. 192, where a devise after the death of A. was held under a peculiar will to vest immediately.

The mere fact that provision has already been made for A. will be an argument against giving a life estate by implication, and therefore in favour of a distributive construction. See *Stevens v. Hale*, 2 Dr. & Sm. 22; *James v. Shannon*, 1 R. 2 Eq. 118.

No implication where possession postponed till A.'s death.

Of course, if the devise after the death of A. can be construed as merely postponing the vesting in possession till the death of A., no argument in favour of implication can arise. *Barnet v. Barnet*, 29 B. 239.

Effect of a residuary devise.

And in the same way, if there is a residuary devise, so that nothing is undisposed of, there can be no implication. *Horton v. Horton*, Cro. Jac. 74.

Bequest of personalty to the next of kin after A.'s death.

II. By analogy to the rule with regard to real property, it appears that if personal property be given to the next of kin, or to one of the next of kin after the death of A., A. will take a life interest by implication, if there is no residuary bequest. *Stevens v. Hale*, 2 Dr. & Sm. 22; *Cock v. Cock*, 21 W. R. 807; *Blackwell v. Bull*, 1 Kee. 176. In *Horton v. Horton*, Cro. Jac. 74, there was in effect a residuary bequest according to the then state of the law.

A life interest will not be implied in A. where the persons to take on his death are not the next of kin or are the next of kin along with other persons. *Ralph v. Carrick*, 11 Ch. D. 873; *Woodhouse v. Spurgeon*, 49 L. T. 97.

In order to imply a life interest in A. there must be something more than a mere gift after his death. Some of the earlier cases in which a life interest has been implied would probably not now be followed. See *Roe v. Summerset*, 5 Burr.

2608; *Bird v. Hunsdon*, 2 Sw. 342; *Humphreys v. Humphreys*, Chap. XLIV.  
4 Eq. 475.

In the case of marriage settlements settling property on the wife during coverture and providing for her death during the husband's life, with limitations after the death of the survivor, but containing no provision for the event of the wife surviving the husband, a life interest has in that event been implied in the wife. *Tunstall v. Trappes*, 3 Sim. 312; *Allin v. Crawshaw*, 9 Ha. 382.

So in wills after a life interest to A., with a life interest in certain events to B., followed by a gift over after the death of A. and B., a life interest has been implied in B. though the events did not happen. *In re Betty Smith's Trusts*, 1 Eq. 79; *In re Blake's Trust*, 3 Eq. 799; see *Isaacson v. Van Goor*, 42 L. J. Ch. 193; 21 W. R. 156.

Where the testator's widow was directed to carry on the testator's business and after his death he directed his property to be divided among his children, the widow took a life interest in the property upon the general intention to keep the family together. *Blackwell v. Bull*, 1 Keen. 176; see *Cockshott v. Cockshott*, 2 Coll. 432.

A residuary bequest or a gift in default of appointment where the bequest after the life of A. is made under a power, affords an argument against the implication of a life interest. *Cranley v. Dixon*, 23 B. 512; *Henderson v. Constable*, 5 B. 297.

There is no implication in favour of A. where the gift is if A. dies under twenty-one or unmarried, since in such a case an absolute interest and not a life estate would have to be implied. *James v. Shannon*, 1 R. 2 Eq. 118; *Harris v. Du Pasquier*, 20 W. R. 668.

#### IMPLICATION OF ABSOLUTE INTERESTS.

1. If there is a gift to A. till twenty-one with a gift over if he dies under twenty-one, A. will take by implication the fee or an absolute interest in personalty, defeasible upon death under twenty-one. *Tomkins v. Tomkins*, cited 1 Burr. 234; *Paylor*

Chap. XLIV. v. *Pegg*, 24 B. 105; *Gardiner v. Stevens*, 30 L. J. Ch. 199; *In re Harrison's Estate*, 5 Ch. 408.

The argument in favour of implication is strengthened if the residuary devisees are different from those who would take under the gift over, so that without implication the property would go to different persons, according as A. died under or over twenty-one. *Cropton v. Davies*, L. R. 4 Ex. 159.

Gift till 21.

2. A simple gift to trustees in trust for A. till he attains twenty-one will not give A. the absolute interest. *In re Hedley's Trusts*, 25 W. R. 529; see *McCutcheon v. Allen*, 5 L. R. Ir. 268.

But very slight indications of intention have been held sufficient to give the absolute interest, though possibly some of the earlier decisions may be difficult to support.

In some cases the Court has found a direct gift to the legatee, with a superadded direction that it was to be in trust till he should come of age. *Atkinson v. Paice*, 1 B. C. C. 91; *Hale v. Beck*, 2 Eden. 229; see *Tunaley v. Roch*, 3 Dr. 720.

In others an absolute interest has been implied from a direction that the trust is to cease at twenty-one, or from a reference to the trustees as trustees for the legatees. *Peat v. Powell*, Amb. 387; 1 Eden. 479; *Wilks v. Williams*, 2 J. & H. 125.

Or, again, an absolute interest has been given because the trustees are directed to apply not only the interest but the produce till the legatees attain twenty-one. *Newland v. Shephard*, 2 P. Wms. 194.

Effect of a gift to A. till 21, for the benefit of himself and another.

3. But the implication will be rebutted if there are circumstances tending to show that the person to take till twenty-one is not to take an absolute interest if he survives twenty-one; if, for instance, the gift is to the wife for her and her son's support till the son attains twenty-one, and if he dies under twenty-one, to the wife for life, and then over. In this case the son did not take the whole interest till twenty-one, and it could therefore hardly be implied that he was to take the whole after that age to the exclusion of his mother. *Fitzhenry v. Bonner*, 2 Dr. 36.

No implica-

4. No implication in favour of children arises upon an

absolute gift of personalty to A. and if he dies without children over, or upon a gift to several as tenants in common and if any die without issue their shares to those then living or their children. *Addison v. Busk*, 14 B. 459; 2 D. M. & G. 810; *Cooper v. Pitcher*, 4 Ha. 485; 16 L. J. Ch. 24; *Dowling v. Dowling*, L. R. 1 Eq. 442; *ib.* 1 Ch. 612.

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tion in favour of children arises in a gift to A. absolutely, and if he dies without children over.

5. Nor does any implication in favour of children arise if the gift is to A. for life and if he dies without children over. *Greene v. Ward*, 1 Russ. 262; *Ranelagh v. Ranelagh*, 12 B. 200; *Sparks v. Restall*, 24 B. 218; *Neighbour v. Thurlow*, 28 B. 33; *Re Hayton's Trusts*, 4 N. R. 54; *Seymour v. Kilbee*, 3 L. R. Ir. 33.

Gift to A. for life, and if he dies without children over.

So in the case of real estate, a gift over in default of issue of A. following limitations to A. for life with remainder to his first son for life, with remainder to the first son of the first son in tail, with remainder to every other son of A. successively for like interests will not give the second and other sons of the first son of A. estates by purchase. *Monypenny v. Dering*, 7 Ha. 568.

6. But though after a gift to A. for life the mere gift over in default of children will not be sufficient to give the children any interest by implication, the Court will, it seems, lay hold of any indication of intention to fortify the argument based upon the gift over, so as to give the children an interest. In the former case, where the absolute interest is given to the first takers, the "mere fact of a testator giving over property in case there are no children does not furnish any presumption on which this Court can act in favour of his giving it to the children, if there are any, as against their parents." *Dowling v. Dowling*, L. R. 1 Ch. 615. But where the parent takes only a life interest the children can take nothing from him, and at the same time the presumption against intestacy arises. It seems *Ex parte Rogers*, 2 Mad. 449, may be supported on this ground; see, too, *Kinsella v. Caffray*, 11 Ir. Ch. 154, where the gift over was not merely on death without issue, but upon such death, or upon death leaving issue, and such issue dying under twenty-one.

7. Possibly where there is a gift to A. to dispose of among a Gift to A. to

- Chap. XLIV.** certain class by deed or will, a life interest would be implied in  
 dispose of among a certain class at his death. A. *Acheson v. Fair*, 3 D. & War. 527. See *Williams v. Roberts*, 27 L. J. Ch. 177; 4 Jur. N. S. 18; and p. 359, *ante*.
- Bare power to appoint to A. 8. A bare power to appoint a sum of money to a particular person will not give that person any interest if the power is not exercised. *Bull v. Vardy*, 1 Ves. J. 270; see *Tweeddale v. Tweeddale*, 7 Ch. D. 633.
- Power to select certain number. It would seem that under a power to select a certain number out of a class there is no gift by implication in default of appointment. See *Carthew v. Enraght*, 20 W. R. 743.
- Wide discretion not exercised. If a wide discretion is given to trustees to apply a fund in the maintenance of a son or in augmentation of the shares of the other children there is no implied gift if the trustees refuse to exercise their discretion. *Re Eddowes*, 1 Dr. & Sm. 395.
- Power in nature of a trust. If the power is so framed as to impose upon the donee the duty of exercising it his failure to do so will not prejudice the beneficiaries. *Brown v. Higgs*, 8 Ves. 561; *Burrough v. Philcox*, 5 M. & Cr. 72.
- Power to tenant for life. And in the ordinary case of a bequest for life with power to the tenant for life to appoint at his death among a class, though the words in which the power is framed may not impose a trust, it seems the beneficiaries who might have taken under the power will take by implication in default of appointment. *Ahearne v. Aherne*, 9 L. R. Ir. 144. *Healy v. Donnery*, 3 Ir. C. L. 213, would probably not be followed.
- If there is a gift over in default of objects of the power, it is clear that the objects of the power will take in default of appointment. *Butler v. Gray*, 5 Ch. 26; see *Kellett v. Kellett*, 1 R. 5 Eq. 298.
- This principle does not apply if there is a gift over in default of appointment. *Pattison v. Pattison*, 19 B. 638; *Roddy v. Fitzgerald*, 6 H. L. 823; and see *In re Jeffery's Trusts*, 14 Eq. 136.
- Nor does it apply where the power is to be exercised only in events which never happen. *Halfhead v. Shepherd*, 28 L. J. Q. B. 248; 5 Jur. N. S. 1162.
- And there may be words showing that the power was meant to be merely discretionary; for instance, a statement that the

testator does not by his will make any further provision for his children, among whom he empowers his wife to appoint certain property. *Carberry v. McCarthy*, 7 L. R. Ir. 328. Chap. XLIV.

## IMPLICATION OF CROSS-REMAINDERS.

1. If there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe d. Gorges v. Webb*, 1 Taunt. 234; *Powell v. Howells*, L. R. 3 Q. B. 655; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116. Cross-remainders implied in devise to several in tail, with gift over in default of issue to take under preceding limitations.

And if the gift over is limited not expressly in default of issue, but as a remainder, the same result follows. *Doe d. Burden v. Burville*, 2 East, 47, n. Where the gift over is limited as a remainder or reversion.

The word reversion would probably now be held to have the same force, notwithstanding *Pery v. White*, Cowp. 777.

The arguments against the implication of cross-remainders, founded upon the number of the devisees and such words as severally or respectively, or the fact that *the whole* is not expressly given over, cannot now be considered as having any weight.

2. The result will be the same if the gift over is in default of issue to take under the preceding limitations, living at the death of their parents. *Maden v. Taylor*, 45 L. J. Ch. 569. Gift over in default of issue living at deaths of ancestors.

3. It has been said that if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. *Clache's case* (Dyer, 330), however, which is usually cited on this point, is no authority for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication Whether the limitation of cross-remainders in certain events prevents the implication of cross-remainders.

**Chap. XLIV.** would be inconsistent. See the remarks by the Lord Justice Turner in *Atkinson v. Barton*, 3 D. F. & J. 339. And the decision in *Rabbeth v. Squire*, 19 B. 77; 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Turner, L. J.:—"Cross-remainders are to be implied or not according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it." *Atkinson v. Barton*, 3 D. F. & J. 339 (reversed on appeal, but on different grounds, 10 H. L. 313); see, too, *Vanderplank v. King*, 3 Ha. 1; *Re Ridge's Trusts*, 7 Ch. 665; *In re Hudson*; *Hudson v. Hudson*, 20 Ch. D. 406, where the rules deducible from the cases are stated.

Cross-re-  
mainders  
implied be-  
tween persons  
taking  
different  
interests.

4. Cross-remainders will be implied even though, as the result of legal rules and not of the testator's intention, the class of persons between whom they are implied take different interests; if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. *Vanderplank v. King*, 3 Ha. 1.

Cross-re-  
mainders  
implied be-  
tween tenants  
for life.

5. Cross-remainders will be implied in a devise to the children of A., which carries to them only a life estate, with a gift over for want of such issue of A. *Ashley v. Ashley*, 6 Sim. 358.

Cross-re-  
mainders  
implied be-  
tween the  
families  
where the  
limitations  
are for life,  
with re-  
mainder to  
children.

6. And where realty or personalty is given to several persons as tenants in common for life with remainders to their issue, followed by a gift over if all should die without leaving issue, cross-limitations between the first takers and their families will be implied. *Re Ridge's Trusts*, 7 Ch. 665; *Re Clark*, 11 W. R. 871; see, too, *Coates v. Hart*, 3 D. J. & S. 504.

Cross-limita-  
tions will not  
be implied so  
as to divest  
vested  
interests.

7. But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption against intestacy, but where there are vested interests there can be no intestacy. See *Rabbeth v. Squire*, 19 B. 70; 4 De G. & J. 406; *Re Clark*, 11 W. R. 871.

Upon the same principle, when the testator has disposed of his whole interest in realty or personalty; if, for instance, absolute vested interests have been given to several as tenants in common, with a gift over upon the death of all in certain

events; cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. *Skey v. Burnes*, 3 Mer. 334; *Bromhead v. Hunt*, 2 J. & W. 459; *Baxter v. Losh*, 14 B. 612; *Beaver v. Nowell*, 25 B. 551. Chap. XLIV.

8. If, however, the interests are not vested, but contingent with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and therefore in all probability cross-limitations would be implied. *Muckell v. Winter*, 3 Ves. 236, 536; *Scott v. Bargeman*, 2 P. Wms. 68; 2 Eq. Abr. 542; *Graves v. Waters*, 10 Ir. Eq. 234. Gift over of contingent interests, if all the legatees die before the time of vesting.

There are no grounds for supposing *Scott v. Bargeman* to be overruled. The point in *Beauman v. Stock*, 2 Ba. & Be. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in *Vize v. Stoney*, 1 Dr. & War. 348, and followed in *Graves v. Waters*.

#### IMPLICATION BY RECITAL.

1. A recital, that a person is entitled under another instrument, when he is not in fact entitled, does not in general amount to a gift by the instrument which contains the recital. *Harris v. Harris*, 1 R. 3 Eq. 610; *Circuit v. Perry*, 23 B. 275. A recital that a person is entitled under another instrument.

2. But a recital that the testator has by the very document containing the recital made a particular gift, which he has not in fact made, is evidence of an intention to confer the bounty. *Adams v. Adams*, 1 Ha. 537. Recital of a supposed gift by the reciting instrument.

Thus a gift alleged to be "in addition" to a prior gift, where there is in fact no such prior gift, is sufficient evidence of an intention to confer the supposed prior gift. *Jordan v. Fortescue*, 10 B. 259; *Furrar v. St. Catherine's Coll.*, 16 Eq. 24. Gift in addition to a supposed gift.

So a statement that the testator does not give a legatee a certain sum because she is absolutely entitled to it, when in fact it is in

Chap. XLIV. the disposition of the testator, amounts to a gift of the sum in question. *Hall v. Leitch*, 9 Eq. 376.

But a mere recital in a codicil of a supposed gift by will will not amount to a gift. *Re Arnold's Estate*, 33 B. 163, 171.

In order that a recital may operate as a gift, it must be clear that there is nothing to which it may refer.

Recital will not cut down a prior express gift.

3. In order that rule 2 may apply it must be clear that there is nothing in the will to which the recital can refer. *Sherratt v. Oakley*, 7 T. R. 492; *Smith v. Fitzgerald*, 3 V. & B. 2; *Mackenzie v. Bradbury*, 35 B. 617, 620; *Nugent v. Nugent*, I. R. 8 Eq. 78; *Ives v. Dodgson*, 9 Eq. 401.

4. Still less can a gift be implied from a recital when the effect of such implication would be to cut down a prior express gift, as from a recital of a gift to B. for life, remainder to his children, when in fact the prior gift was to the children immediately. *Re Smith*, 2 J. & H. 594.

## CHAPTER XLV.

## REVOCATION.

PRIOR to the Wills Act a devise was revoked if the testator afterwards made a conveyance of the land for any purpose (except a mortgage), though the conveyance was only of the legal estate. *Lord Lincoln's Case*, Show. P. C. 154; 1 Eq. Ab. 411, pl. 1; 11 Jarman, 4th Ed. 150.

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Revocation  
before the  
Wills Act.

Partition was no exception to the general rule where a conveyance was made to a trustee to divide, though, if the partition was effected by a mere release to uses, there was no revocation. *Grant v. Bridger*, L. R. 3 Eq. 347.

Now, by the 23rd section of the Wills Act, it is provided that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death.

Effect of the  
23rd section of  
the Wills Act.

This section applies to cases in which a gift would have been formerly revoked by alteration of estate, but not to cases of ademption. *Moor v. Raisbeck*, 12 Sim. 123; *Ford v. De Pontes*, 30 B. 572.

The section  
does not  
apply to cases  
of ademption.

The subject of revocation of testamentary instruments has been treated *ante*, pp. 32—43. The cases upon revocation as a question of construction are so special that they are of little use as general authorities, and hardly admit of a satisfactory classification.

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The following general rules may, however, be laid down with regard to revocation:—

It must be reasonably clear that a bequest is meant to be revoked.

1. To cut down a previous gift it must be reasonably clear that it was meant to be cut down. The rule is not that the words of revocation must be as clear as the words of original gift. See *Randfield v. Randfield*, 8 H. L. 225; *Wallace v. Seymour*, 20 W. R. 334; *Beamish v. Beamish*, 1 L. R. Ir. 501.

Thus, if property is given to A. for life with remainder for her children, and by a codicil all gifts in favour of A. are revoked, the remainder to the children remains. *Green v. Tribe*, 27 W. R. 39; 47 L. J. Ch. 783.

But if the original gift is to A., followed by a direction to settle it, the gift "to or in favour" of A. is revoked. *Tabor v. Prentice*, 32 W. R. 872.

Where property is given to A. for life with remainders over and the gift to A. only is revoked, but the property is given absolutely to B., the whole original gift is revoked. *Murray v. Johnstone*, 3 D. & War. 143; *Fry v. Fry*, 9 Jur. 894; see *Wells v. Wells*, 2 W. R. 6; 17 Jur. 1020; *Hargreaves v. Pennington*, 12 W. R. 1047.

So, when there is a gift to A. with executory limitations over, and the trusts of the will as regards the gift to A. are revoked, the gifts over are revoked as well. *Boulcott v. Boulcott*, 2 Dr. 25.

Gifts will not be considered revoked further than is necessary.

2. The dispositions of the will will not be disturbed more than is necessary to give effect to a revocation by codicil.

Thus, where a legacy is charged on real and personal estate and the charge on the personal estate is revoked by a codicil, the charge on the realty remains. *Kermode v. Macdonald*, 3 Ch. 585; *Leese v. Knight*, 12 W. R. 1097.

Where a legacy is charged on two funds, one of which is afterwards by a codicil given free from the charge, the charge remains on the other fund and does not abate in the proportion of the two funds. *Tatlock v. Jenkins*, Kay, 654.

So, too, when land is given subject to a charge to A., and the devise is afterwards revoked, the charge remains. *Beckett v. Harden*, 1 Mau. & S. 1; see *Grice v. Funnell*, 1 Sm. & G. 130.

A legacy which is revoked is not set up again because the

disposition in favour of which the revocation is made is incomplete or incapable of taking effect. *Tupper v. Tupper*, 1 K. & J. 665; *Nevill v. Boddam*, 28 B. 584; *Quinn v. Butler*, 6 Eq. 225; see *Onions v. Tyrer*, 1 P. Wms. 343; 2 Vern. 741; *Baker v. Story*, 23 W. R. 147; see *ante*, Ch. VI., p. 36.

When personalty is directed to go upon the same trusts as realty and the trusts of the realty are afterwards revoked, the gift of the personalty remains. *Lord Beauclerk v. Mead*, 2 Atk. 167; *Darley v. Longworth*, 3 B. P. C. 359; *Agnew v. Pope*, 1 De G. & J. 49; *Martineau v. Briggs*, 23 W. R. 889; *Bridges v. Strachan*, 26 W. R. 691. *Lord Carrington v. Payne*, 5 Ves. 404, would probably not be followed. See *Re Gibson*, 2 J. & H. 656.

Personalty directed to go upon the trusts of realty which are revoked.

But if the gift is of money to be laid out in repairing certain premises and the surplus is given to the same persons to whom the premises are devised and this latter devise is revoked, the gift of personalty also fails. *Whiteway v. Fisher*, 9 W. R. 433.

3. A gift by will is not revoked by an erroneous recital of it by a codicil. *Re Smith*, 2 J. & H. 594; *Mann v. Fuller*, Kay, 624.

Erroneous recital will not revoke a gift.

But an erroneous recital of a gift does not prevent the revocation of the gift if the subsequent dispositions are inconsistent with it. *Re Margitson*; *Haggard v. Haggard*, 30 W. R. 920; 31 *ib.* 257.

4. An alteration or addition to a gift in a will expressed to be made upon an assumption of fact, which turns out to be erroneous, does not take effect. *Campbell v. French*, 3 Ves. 321; *Doe d. Evans v. Evans*, 2 Per. & D. 378; 10 Ad. & E. 228; *Barclay v. Maskelyne*, Johns. 124.

Revocation owing to an erroneous assumption of fact.

But if the alteration or addition is made because the testator is doubtful whether some fact is true or not, the alteration takes effect. *A.-G. v. Lloyd*, 3 Atk. 552; 1 Ves. sen. 32; *A.-G. v. Ward*, 3 Ves. 327.

The distinction seems to be not between the fact and the testator's belief in the fact, but between a fact and a possibility which the testator is unable to verify, and therefore an additional gift founded upon an erroneous belief would fall under the former head. *Thomas v. Howell*, 18 Eq. 198.

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## INCONSISTENCY.

The later of  
two inconsis-  
tent gifts  
takes effect.

When two clauses in a will are absolutely irreconcilable the later one is to be preferred. *Crons v. Odell*, 1 Ba. & B. 449; 3 Dow. 61; *Ulrich v. Lichfield*, 2 Atk. 372; *Morrall v. Sutton*, 1 Ph. 533; *Paice v. Archbishop of Canterbury*, 14 Ves. 366.

But if possible the Court will reconcile two dispositions apparently inconsistent. See *Kerr v. Baroness Clinton*, 8 Eq. 462; *In re Bywater*; *Bywater v. Clarke*, 18 Ch. D. 17.

Gift of the  
same property  
to two  
persons.

Thus, if the same property is given to two persons in fee in two different parts of the will, they will take as joint tenants. *Paramour v. Yardley*, Plow. 541; *Bennett's Case*, Cro. Eliz. 9; see *Sherratt v. Bentley*, 2 M. & K. 149, 162.

This does not, however, apply as between will and codicil. *Re Hough's Estate*, 15 Jur. 943; 20 L. J. Ch. 422; *Evans v. Evans*, 17 Sim. 107.

So, too, if land is given to one person without and to another person with words of limitation, the latter will take a fee in remainder. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

Similarly where immediate interests in fee and in tail or in fee and for life are given in the same lands, the devise of the fee will be construed as a remainder whether the devise of the particular estate precedes the devise of the fee or not. *Wallop v. Derby*, Yelv. 209; see *Conquest v. Conquest*, 16 W. R. 453.

Gifts of the  
testator's  
whole estate,  
and of a  
residue in the  
same will.

In cases where the whole personalty is given to a person absolutely and then there is a gift of the residue at her decease, the earlier gift has been held to be for life only. *Sherratt v. Bentley*, 2 M. & K. 149; *Re Brook's Will*, 13 W. R. 573; *Hare v. Westropp*, 9 W. R. 689.

And the same construction has been adopted where there were no words referring to the death of the first legatee, but the gift was to her children. *In re Bagshaw's Trusts*, 24 W. R. 875; 25 W. R. 659; 46 L. J. Ch. 567.

Gifts of the  
residue and of  
the remainder  
in the same  
will.

So, if a testator gives the remainder of his property to A. and makes B. his residuary legatee, B. will take only lapsed legacies. *Re Jessop*, 11 Ir. Ch. 424; *Daves v. Bennett*, 30 B. 226;

*Kilvington v. Parker*, 21 W. R. 121; *Bristow v. Masefield*, 31 W. R. 88. Chap. XLV.

But a residuary gift by codicil revokes a residuary gift by will.

*Earl of Hardwicke v. Douglas*, 7 C. & F. 795.

Similarly, a gift of all the testator's property, followed by gifts of specific portions of it or *vice versa*, may both take effect. *Cuthbert v. Lempriere*, 3 Mau. & S. 158; *Doe d. Snape v. Nevile*, 11 Q. B. 466; *Blamire v. Geldart*, 16 Ves. 314; *In re Arrowsmith's Trusts*, 8 W. R. 555; 2 D. F. & J. 474; *Robertson v. Powell*, 3 N. R. 433. Gifts of all the testator's property, followed by gifts of portions of it.

Where, however, all the testator's personal property was given to his widow for life, subsequent legacies were held to be not payable till after her death. *Burdett v. Young*, 9 Mad. 93; 5 B. P. C. 54.

As between a will and codicil, however, the argument is much stronger in favour of revocation. At any rate, where a testator by his will distinguishes between specific legacies and residue and by a codicil gives all his personal property, the codicil revokes the specific legacies as well as the residuary gift. *Kermode v. Macdonald*, L. R. 1 Eq. 457; 3 Ch. 584. As between will and codicil the argument is in favour of revocation.

## CHAPTER XLVI.

## ALTERING WORDS.—UNCERTAINTY.

## CHANGING WORDS.

**Chap. XLVI.** THE Court will change a word when it appears from the context of the will that the word was incorrectly employed by the testator in place of some other word.

Several cases in which "or" has been changed into "and," and *vice versa*, have already been mentioned in the discussion of the construction of gifts over. It remains to mention some cases in which a similar change has been made in direct gifts.

"Or" will not be changed into "and" in a condition precedent.

When there is a gift to a person upon one or other of two events, "or" will not be read "and," as the result would be to make the conditions cumulative instead of alternative. *Hawksworth v. Hawksworth*, 27 B. 1.

"Nor" may mean "or not."

And it seems in a condition precedent to vesting "nor" will mean "or not," if the result is to vest the gift in either of two events. *Muckenzie v. King*, 12 Jur. 787; 17 L. J. Ch. 448.

"And" changed into "or" upon the context.

On the other hand, in some cases on the context of the will "and" has been read "or," so as to vest a gift in alternative in lieu of cumulative events. *Hawes v. Hawes*, 1 Ves. sen. 13; *Jackson v. Jackson*, 1 Ves. sen. 216; *Stapleton v. Stapleton*, 2 Sim. N. S. 212, with which compare *Malmesbury v. Malmesbury*, 31 B. 407; *Maynard v. Wright*, 26 B. 285.

"Fourth" changed into "Fifth."

Upon the same principle the Court has changed the word fourth into fifth, where it was clear upon the construction of the whole will that the testator intended to refer to the fifth and not to the fourth schedule. *Hart v. Tulk*, 2 D. M. & G. 300.

See *Surtees v. Hopkinson*, 4 Eq. 98; *Smith v. Crabtree*, 6 Ch. D. 591; *In re Northen's Estate*; *Salt v. Pym*, 28 Ch. D. 153. Chap. XLVI

## SUPPLYING WORDS.

With regard to supplying words in a will the rule seems to be that where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it or supplying some word, while at the same time the latter course will make the will consistent, the Court will be justified in making the necessary addition. See *Hope v. Potter*, 3 K. & J. 206; *In re Morony*, 1 L. R. Ir. 483.

Thus, in a devise to A. for life, remainder "to the first son of A. severally and successively in tail male," the devise will be construed as to the first and other sons of A. *Parker v. Tootal*, 11 H. L. 143. See *Newburgh v. Newburgh*, Lord St. Leonards' Law of Property, 367. Limitation to the second and other sons supplied.

Under a bequest in trust for the testator's widow for her life in trust for his children, followed by powers of maintenance and advancement after the widow's death, with an ultimate gift over after her death in default of children attaining vested interests, the Court supplied the words "and after her death" after the words "for her life." *Greenwood v. Greenwood*, 5 Ch. D. 954.

So, too, where there was a limitation in a settlement to the children of the marriage who being a son or sons should attain twenty-one years; and if there should be but one such child, the whole to be in trust for such one child, his or her executors and administrators, and there were powers of applying the presumptive share of every such child for his or her maintenance until his or her share should become vested, the Court held daughters to be included in the gifts. *In re Daniel's Settlement Trusts*, 1 Ch. D. 375. Limitation to daughters supplied in a marriage settlement.

In a somewhat similar case, where there were limitations to daughters for life with remainder to their children, and the limitation to the children of one daughter was omitted, it was supplied upon the general intention of the will. *In re Redfern*;

**Chap. XLVI.** *Redfern v. Bryning*, 6 Ch. D. 133; see *Re Smith; Bashford v. Chaplin*, 45 L. T. N. S. 246.

The words  
"without  
issue" sup-  
plied, so as  
not to divest a  
prior estate  
tail

So when there is a gift to A. in tail, and if he die over, the words "without issue" will be supplied in the gift over to satisfy the implied contingency. *Anon.* 1 And. 33.

And in a similar case, where there were devises to several in tail and the interest of one of the tenants in tail was given over to another, "if he died living Alice," the words "without issue" were supplied, there being a gift over of the whole upon death of all the tenants in tail without issue. *Spalding v. Spalding*, Cro. Car. 185.

*Abbott v.  
Middleton.*

The extreme limit to which the Court will go in supplying words in such cases is probably marked by *Abbott v. Middleton*, 7 H. L. 68. The gift there was of personalty to the testator's wife for life and then to his son for life with remainder to the son's children and "in case of my son dying before his mother" over. The son died, leaving a child, and the House of Lords held (diss. Lords Cranworth and Wensleydale) that the words "without children" must be supplied in the gift over, so as to leave the child of A. in possession of the property.

However, if the testator expressly distinguishes death in the lifetime of a tenant for life from death without issue; if, for instance, the gift over is either in the event of death before the tenant in tail or in the event of death without issue at any time, the gift over must be literally construed. *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

Where a testator bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate my son my executor," it was held that the residue was undisposed of. *Driver v. Driver*, 43 L. J. Ch. 279.

#### UNCERTAINTY.

If it is impossible to ascertain the subject-matter or the objects of a gift, it will be void for uncertainty.

A bequest  
of indefinite

Thus, a gift of some of my linen, not saying how much, or of a handsome gratuity, is void. *Peck v. Halsey*, 2 P. Wms. 387;

*Jubber v. Jubber*, 9 Sim. 503. See *Jones d. Henry v. Hancock*, Chap. XLVI. 4 Dow. 145.

On the other hand, if the testator supplies a measure of the bequest, the Court will ascertain how much ought to be expended; thus, a gift of a sum of money to an executor for his trouble, or even of a house or garden to be built at the expense of his executors, is good, and the Court will fix the amount. *Jackson v. Hamilton*, 3 J. & Lat. 702; *Edwards v. Jones*, 35 B. 474. See *Magistrates of Dundee v. Morris*, 3 Macq. 134.

amount is  
void.

A gift of 50*l.* or 100*l.*, or of a sum not exceeding a certain amount, will be construed in favour of the legatee as a gift of the larger sum. *Seale v. Seale*, 1 P. Wms. 290; *Thompson v. Thompson*, 1 Coll. 395; *Cope v. Wilmot*, 1 Coll. 396, *n.*; *Gough v. Bult*, 16 Sim. 45.

Gift of a sum  
not exceeding  
a certain  
amount.

Upon similar principles the gift of the rest of a fund, if the rest cannot be ascertained, is void; as in a devise of such houses as she shall select to A. and the others to B., where A. dies before the testator. *Boyce v. Boyce*, 16 Sim. 476; *Jerningham v. Herbert*, 4 Russ. 388.

Gift of the  
rest of a fund  
when the rest  
cannot be  
ascertained.

In the case of a fund bequeathed upon trust to apply a portion to a purpose which is void and the surplus to charity, it seems the whole fund may be applied to charity though the amount applicable to the invalid object may not be ascertainable.

Surplus to  
charity after  
void object.

For instance, if a fund is given upon trust to apply the income in repairing a tomb and to give the surplus to a charitable object, the charitable object is entitled to the whole fund. *Fisk v. A.-G.*, 4 Eq. 521; *Hunter v. Bullock*, 14 Eq. 45; *Dawson v. Small*, 18 Eq. 114; *In re Williams*, 5 Ch. D. 735; *In re Birkett*, 9 Ch. D. 576; see *Fowler v. Fowler*, 33 B. 616; *Kirkman v. Lewis*, 38 L. J. Ch. 570.

Possibly, if the invalid object is such that the whole fund might fairly be expended upon it, the whole gift will be void. *Chapman v. Brown*, 6 Ves. 404; *Cramp v. Playfoot*, 4 K. & J. 479.

The Court will, if possible, ascertain the amount necessary for each object in order to prevent the gift of the surplus from

Chap. XLVI. being void for uncertainty. *Mitford v. Reynolds*, 1 Ph. 185, and 16 Sim. 105; *Magistrates of Dundee v. Morris*, 3 Macq. 134; *Fisk v. A.-G.*, 4 Eq. 521.

Devise of  
Scotch land.

For the construction of a devise of land in Scotland in terms of art appropriate to English law, see *Studd v. Cook*, 8 App. C. 577.

## CHAPTER XLVII.

## SATISFACTION AND ADEMPTION.

## SATISFACTION.

WHEN a parent or a person *in loco parentis* has covenanted to pay a portion to a child and afterwards gives a legacy of the same or a larger amount to that child, the legacy is *prima facie* a satisfaction of the portion and if the legacy is of smaller amount it is a satisfaction *pro tanto*. *Warren v. Warren*, 1 B. C. C. 305; 1 Cox, 41.

Chap. XLVII.

Satisfaction of portions by legacies.

Declarations by the testator are admissible to rebut the presumption against double portions. *In re Tussaud's Estate*, 9 Ch. D. 363.

Satisfaction only arises between a gift and a prior liability to give and not between a sum actually settled and a subsequent gift by will or otherwise. *Samuel v. Ward*, 22 B. 347.

Satisfaction arises between a gift and a liability to give.

On the other hand, when there is a gift by will to a child, and the testator afterwards in his lifetime gives the child a sum of money, the bequest is adeemed *pro tanto*.

Satisfaction and ademption distinguished.

The difference between the two cases is, that in the former case the portion which the testator has covenanted to pay can only be satisfied by the bequest with the consent of the objects of the covenant; in the latter case the gift by will is revocable and the testator may substitute for it any form of gift he pleases.

Again, in the former case the question whether the gift by will was intended to be a satisfaction of the covenant is a question of testamentary intention; in the latter the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself.

**Chap. XLVII.** Lastly, in cases of satisfaction, election must always arise; in cases of ademption it never can.

It follows that the presumption that a gift by will is intended to be a satisfaction of a prior covenant to pay a portion is more easily rebutted than the similar presumption in the case of ademption.

Thus, the fact that the objects of the gift by will are not the same as the objects of the covenant, is a stronger argument against satisfaction than against ademption, as the testator cannot be supposed to have wished to do by his will what it was out of his power to do, though, on the other hand, the argument is inconclusive, since the bequest by will may be intended as a satisfaction with regard to some of the objects of the covenant, leaving such of them as take nothing under the will to their rights under the covenant. See *In re Tusseaud's Estate*, 9 Ch. D. 363.

Covenant to settle for life satisfied by absolute bequest.

Thus, a covenant to settle a certain share upon a son for life and then upon trusts for the benefit of his wife and children, is satisfied as regards the son by a bequest to him absolutely. *McCarogher v. Whieldon*, 3 Eq. 236; see *Bennett v. Houldsworth*, 6 Ch. D. 671.

Covenant to settle in remainder satisfied by immediate bequest.

So, too, a direct bequest to grandchildren is, as regards the grandchildren, a satisfaction of a covenant to settle a sum upon a daughter and her husband for their lives and the life of the survivor, remainder to their children as they should appoint and in default of appointment to the children equally. *Campbell v. Campbell*, L. R. 1 Eq. 383.

Legacies in lieu of claims under the settlement.

The fact that legacies to the testator's widow are declared to be in lieu of her claim under the settlement will not rebut the presumption against double portions in the case of legacies to children without any such declaration. *Ackworth v. Ackworth*, cited 3 Ves. 527; 1 B. C. C. 307, *n.*; *Moulson v. Moulson*, 1 B. C. C. 83; see, too, *Finch v. Finch*, 1 Ves. jun. 534, where the legacy was expressed to be for a portion.

Satisfaction rebutted by the difference between the subject-matter of the

The presumption of satisfaction may be rebutted by the difference in the thing given by the will and covenanted to be settled.

a. Thus a devise of land is no satisfaction of a covenant to

pay money, unless the lands are expressly estimated by the testator in money. *Goodfellow v. Burchett*, 2 Vern. 298; *Ben-gough v. Walker*, 15 Ves. 507; see *In re Lawes*; *Lawes v. Lawes*, 20 Ch. D. 81. Chap. XLVII.  
covenant and  
bequest.

But the fact that the gift by will is of a share of residue will not prevent the gift being a satisfaction of a portion. *Lady Thynne v. Earl of Glengall*, 2 H. L. 131. Portion  
satisfied by  
gift of residue.

b. A contingent legacy is no satisfaction of a vested portion. *Bellasis v. Uthwait*, 1 Atk. 426; *Hanbury v. Hanbury*, 2 B. C. C. 352; *Pierce v. Locke*, 3 Ir. Ch. 205, 215. Contingent  
legacy and  
vested por-  
tion.

The presumption of satisfaction will not be rebutted by slight differences between the covenant and the will; as, for instance, differences in the mode of payment, the covenant being to pay on the widow's death, the will within three months of her death. *Sparkes v. Cator*, 3 Ves. 530; *Copley v. Copley*, 1 P. Wms. 146; see *Bethel v. Abraham*, 22 W. R. 745. Differences  
between the  
covenant and  
the will  
insufficient to  
rebut satis-  
faction.

Or by the fact that the covenant contains a provision for children dying before their portions are payable and the will does not. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

Or that the settlement gives a power to the husband and wife jointly, while the will gives it to the wife alone. *Thynne v. Earl of Glengall*, 2 H. L. 131; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899.

Or that the settlement is upon children of the daughter by a particular marriage, whereas the gift by will is to all the children. *Thynne v. Earl of Glengall*, *sup.*; *Russell v. St. Aubyn*, 2 Ch. D. 398.

A restraint upon anticipation will not rebut satisfaction, nor will the fact that the will gives a remainder to children in fee, the covenant being to them in tail. *Weall v. Rice*, 2 R. & M. 251.

Nor will the fact that the gift by will gives the wife the first life estate, whereas the covenant gives it to the husband. *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899.

Nor the fact that the life estate given to the husband by the will is determinable on bankruptcy or alienation, there being no such liability to determine in the covenant. *Russell v. St. Aubyn*, *sup.*

**Chap. XLVII.** The omission from the will of a life interest to the husband, who took the second life interest under the covenant, has been held not to rebut the presumption of satisfaction. *Mayd v. Field*, 3 Ch. D. 587.

What amount  
of difference  
is sufficient  
to rebut  
satisfaction.

But a legacy to a daughter for life for her separate use and after her decease, in case her husband should be living, for such persons exclusive of her husband as she should appoint, and in case he should die in her lifetime to her appointees, is not a satisfaction of a covenant to settle on trust to pay a part to the daughter for pin-money and the rest to the husband for life, and if the daughter survive him to her for life, remainder to the children of the marriage as she shall appoint. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; see *Lewis v. Lewis*, I. R. 11 Eq. 110, 340.

Nor is a legacy to a daughter for life to her separate use without power of anticipation with remainder to her children, a satisfaction of a covenant to settle upon such trusts as the daughter should with the consent of trustees appoint, and subject thereto for the daughter and her husband successively for life, remainder for the children and in default of children for the husband absolutely. *In re Tussaud's Estate*, 9 Ch. D. 363.

Direction to  
pay debts.

It seems that a direction in the will to pay debts, or debts and legacies, would not alone rebut the presumption of satisfaction, though great stress has been laid upon it, and, coupled with other circumstances, it will have that effect. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Paget v. Grenfell*, 6 Eq. 7; *Bennett v. Houldsworth*, 6 Ch. D. 671.

Covenant in  
the nature of  
a debt.

Again, when the portion covenanted to be paid is in the nature of a debt due to the husband or the trustees of the settlement, the presumption of satisfaction is more easily rebutted.

Thus, in *Hall v. Hill*, 1 Dr. & War. 94, a legacy to the daughter was held to be no satisfaction of a bond to the husband on the marriage of the daughter. See, too, *Chichester v. Coventry*, *supra*.

## SATISFACTION IN THE CASE OF STRANGERS.

## Chap. XLVII.

In the case of gifts by strangers, there is no presumption against double portions and a question of satisfaction can only arise upon the express declaration of the donor, that subsequent gifts by him are to go in satisfaction of what he has given by the instrument containing the declaration.

Express declaration that legacies are to be in satisfaction.

In such cases the question has arisen whether a provision by will is to be considered an advancement in the lifetime of the testator.

Whether provision by will is an advancement in the testator's lifetime.

There can be no doubt that, where there is a declaration that gifts made by a father "in his lifetime or by his will," or "in his life or at his death," are to go in satisfaction, provision by will would be included in these words. *Papillon v. Papillon*, 11 Sim. 642; *Rickman v. Morgan*, 1 B. C. C. 63; 2 B. C. C. 393.

But there is no such rule as that supposed to have been laid down by Lord Eldon in *Leake v. Leake*, 10 Ves. 476, p. 488, that a provision by will is to be considered as an advancement in the lifetime of the party. Whether it is or not depends on the language of the declaration.

Thus, a declaration that if the father should during his life advance or pay any sums for the benefit of his children, the sums so advanced should be taken *pro tanto* in satisfaction of the portions of his children, will not include gifts by will. *Cooper v. Cooper*, 8 Ch. 813; see *Douglas v. Willes*, 7 Ha. 318.

Though, on the other hand, the words may be large enough to include provision by will; where, for instance, the proviso is, if the father should have bestowed or given portions to his children on their marriage, "or otherwise provided for them." *Leake v. Leake*, 10 Ves. 477.

And the words "settle, give, or advance" have been held to include provision by will. *Onslow v. Michell*, 18 Ves. 490; see, too, *Golding v. Haverfield*, 13 Pr. 593; M'Cl. 345; *Fazakerley v. Gellibrund*, 6 Sim. 591; but the authority of these cases must be looked upon as doubtful since *Cooper v. Cooper*.

A devise of lands is not within a proviso that sums of money advanced are to be taken in satisfaction, nor is a gift to the

**Chap. XLVII.** trustees of the marriage settlement of the donee, and not the donee personally. See Lord Romilly's judgment, *Cooper v. Cooper*, 6 Ch. 820, *n*.

Declaration that advances are to be in satisfaction, unless the contrary is directed in writing.

Where sums advanced are directed to be taken in satisfaction, unless the contrary is directed in writing by the person making the advance, the declaration to the contrary need not be express, but may be gathered from the general terms of the instrument by which the advance is made. *Leake v. Leake*, 18 Ves. 494; *Fazakerley v. Gellibrand*, 6 Sim. 591.

#### SATISFACTION OF DEBTS.

Legacy of equal or greater amount is a satisfaction of a debt.

The doctrine of satisfaction also applies to a legacy to a creditor. In such a case the legacy, if of equal or greater amount, is *primâ facie* considered a satisfaction of the debt. *Talbot v. Shrewsbury*, Prec. Ch. 394; *Fowler v. Fowler*, 3 P. Wms. 353.

The general rule has, however, been so often disapproved of, and has been held to be excluded by such slight indications of intention, that it is of small practical importance.

1. As to what debts may be satisfied by legacies:—

The debt must exist at the date of the will.

*a.* The debt to be satisfied must be a debt existing at the date of the will. *Cranmer's Case*, 2 Salk. 508; *Thomas v. Bennett*, 2 P. Wms. 343; *Plunkett v. Lewis*, 3 Ha. 330.

The debt must be certain.

*b.* The testator must have been certain at the date of the will that a debt was due and to whom it was due, and therefore a mere liability on a current account, or on a negotiable instrument, such as a bill of exchange, will not be satisfied by a legacy. *Rawlins v. Powell*, 1 P. Wms. 297; *Carr v. Eastabrooke*, 3 Ves. 561.

But the fact that the debt is liable to decrease makes no difference. *Edmunds v. Low*, 3 K. & J. 318.

2. As to what legacies will not be considered to satisfy debts:—

Legacy of smaller amount is no satisfaction of a debt.

*a.* A legacy of smaller amount is no satisfaction of a debt. *Cranmer's Case*, 2 Salk. 508; *Atkinson v. Webb*, 2 Vern. 478; *Eastwood v. Vinke*, 2 P. Wms. 614; *Gee v. Liddell*, 35 B. 621; see *Richardson v. Elphinstone*, 2 Ves. jun. 468; *Reade v. Reade*, 9 L. R. Ir. 409.

b. Nor is a gift of residue. *Barrett v. Beckford*, 1 Ves. sen. Chap. XLVII. 519.

c. Nor is a gift of a contingent legacy. *Tolson v. Collins*, 4 Ves. 482; *Matthews v. Matthews*, 2 Ves. sen. 635.

Gift of residue, of a contingent legacy.

3. Satisfaction is also rebutted by the difference in the nature of the legacy and the debt.

a. As where the debt is by bond and the testator devises land. *Eastwood v. Vinke*, 2 P. Wms. 614; *Richardson v. Elphinstone*, 2 Ves. jun. 463.

Debt by bond is not satisfied by a devise of land.

b. If the legacy is less advantageous than the debt; if, for instance, the legacy is payable in six months, the debt in one: *Haynes v. Mico*, 1 B. C. C. 129; *Deveze v. Pontet*, 1 Cox, 188; *Adams v. Lavender*, M'C. & Y. 41; or the legacy is payable half-yearly, the debt quarterly: *Atkinson v. Webb*, Prec. Ch. 236; if the debt is secured, the legacy not: *Wood v. Wood*, 7 B. 183; or the debt is a first charge, the legacy not: *Hales v. Darell*, 3 B. 325; if the debt is to the separate use, the legacy not. *Bartlett v. Gillard*, 3 Russ. 149; *Rowe v. Rowe*, 2 De G. & S. 294; *Fourdrin v. Gowdey*, 3 M. & K. 409; but see *Atkinson v. Littlewood*, 18 Eq. 595.

Debt not satisfied when the legacy is less advantageous.

And an annuity given by will and therefore not payable till a year after the testator's death, is not a satisfaction of a covenant to pay an annuity by half-yearly payments. *In re Dowse*; *Dowse v. Glass*, 50 L. J. Ch. 285.

c. Sums held on trust for a tenant for life are not satisfied by legacies of those amounts to the tenants for life absolutely. *Fairer v. Park*, 3 Ch. D. 309.

d. If the legacy is expressed to be given in satisfaction of dower. *Pinchin v. Simms*, 30 B. 119; *Glover v. Hartcup*, 34 B. 74.

Legacy in lieu of dower.

e. The fact that the debt is due to one set of trustees, and the legacy is given to another, is a circumstance to be considered, but apparently not alone decisive. *Pinchin v. Simms*, 30 B. 119; *Smith v. Smith*, 3 Giff. 121; and see *Atkinson v. Littlewood*, 18 Eq. 595.

Debt due to one set of trustees, legacy to another

4. The presumption will be rebutted by a direction to pay "debts and legacies." *Chancey's Case*, 1 P. Wms. 408; *Lethbridge v. Thurlow*, 15 B. 334; *Richardson v. Greese*, 3

Direction to pay debts and legacies.

Chap. XLVII. Atk. 65; *Field v. Mostin*, 2 Dick. 543; *Jefferies v. Michell*, 20 B. 15; *Hassell v. Hawkins*, 2 Dr. 469.

But not if the direction is in the will, and a debtor whose debt is incurred subsequent to the will receives a legacy by a codicil. *Gaynon v. Wood*, 1 P. Wms. 409, n.

Whether a debt payable within three months of the testator's decease would be within the direction to pay debts seems doubtful. In *Wathen v. Smith*, 4 Mad. 325, it was held not; on the other hand, Lord Romilly, in *Cole v. Willard*, 25 B. 568, disapproved of this decision. See, too, *Atkinson v. Littlewood*, 18 Eq. 595.

Direction to  
pay debts  
only.

Whether a direction to pay "debts" only will have the effect of rebutting the presumption of satisfaction seems doubtful. There is no case deciding that it will, and there is the express decision of Lord Hatherley as V.-C. that it will not: *Edmunds v. Low*, 3 K. & J. 318. Against this must be set the dicta of Lord Romilly, in *Cole v. Willard*, 25 B. 568; *Pinchin v. Simms*, 30 B. 119; and of V.-C. Malins in *Atkinson v. Littlewood*, 18 Eq. 595. All the cases, however, show that a direction to pay debts only is a circumstance to be taken into account.

#### ADEMPITION.

As ademption arises from acts subsequent to the will, there can be no expression of intention contained in the will as to whether a subsequent gift was meant to be an ademption or not; the question is, therefore, not properly within the limits of the present treatise. For the sake of convenience, however, it may be useful to notice a few of the more important points arising with reference to this subject.

Ademption  
of legacies by  
advances.

I. A bequest to a child or person to whom the testator has placed himself in *loco parentis* is adeemed by a subsequent gift to the legatee in the testator's lifetime, unless the nature of the two gifts is so different as to rebut the presumption. *Leighton v. Leighton*, 18 Eq. 459; see *Boyd v. Boyd*, 4 Eq. 305; *Taylor v. Taylor*, 20 Eq. 155.

A gift of less amount than the legacy is an ademption *pro tanto*. *Pym v. Lockyer*, 5 M. & Cr. 29.

For the purposes of ademption the value of the advance is to be taken as at the time it was made. *Watson v. Watson*, 33 B. 576. Chap. XLVII

For the mode of valuing annuities, see *Hatfield v. Minet*, 8 Ch. D. 136.

Ademption applies as well to a gift of residue as to general legacies, though in the case of residue it will be applied only between children against a child in favour of a child, and not in favour of a stranger. *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Meinertzagen v. Walters*, 7 Ch. 670. Ademption in the case of a residue.

Differences in the time of payment of the legacy and the portion are immaterial. *Hartopp v. Hartopp*, 17 Ves. 184; *Stevenson v. Masson*, 17 Eq. 84.

Advances, however, for some particular purpose, as to buy a wedding outfit or small occasional presents, or even a small annual allowance, will not adeem legacies by will. *Ravenscroft v. Jones*, 32 B. 669; *Watson v. Watson*, 33 B. 574; *Schofield v. Heap*, 27 B. 93; see *Hatfield v. Minet*, 8 Ch. D. 136. Small advances for a particular purpose will not adeem a legacy.

As in the case of satisfaction the presumption of ademption may be repelled by the difference in the subject-matter of the two gifts.

Thus there will be no ademption if the legacy is money and the gift is stock-in-trade. *Holmes v. Holmes*, 1 B. C. C. 555. See *Davis v. Boucher*, 3 Y. & C. Ex. 411; *Pym v. Lockyer*, 5 M. & C. 48; *In re Lawes*; *Lawes v. Lawes*, 20 Ch. D. 81. Legacy of money not adeemed by a gift in stock-in-trade.

Nor if the legacy is certain and the gift is contingent. *Spinks v. Robins*, 2 Atk. 493; *Crompton v. Sale*, 2 P. Wms. 553. Vested legacy and contingent advance.

A bequest of a sum of money to a child absolutely is adeemed by the subsequent settlement of that or a larger amount on the marriage of the child; if a smaller amount is settled, it is an ademption *pro tanto*. *Lord Durham v. Wharton*, 3 Cl. & F. 146; *Stevenson v. Masson*, 17 Eq. 78; *Edgeworth v. Johnston*, 11 R. 326. A legacy is adeemed by a subsequent settlement.

And even if the legacy be given to the child for life with remainder to her children, a subsequent gift to her absolutely is an ademption. *Kirk v. Eddowes*, 3 Ha. 509.

But where there is a substitutional gift to the issue of a child dying in the testator's lifetime, a subsequent advancement to a Advance to a child will not adeem a

**Chap. XLVII.** child who dies in the testator's lifetime leaving issue will not operate as an ademption of the gift to the issue. *Rose v. Rogers*, 39 L. J. Ch. 791; *Hewitt v. Jardine*, 14 Eq. 58.

substitutional bequest to his issue.  
Gift to the husband for the purposes of the marriage adeems a legacy to the daughter.  
And a sum given to a daughter's husband in consideration of his making a settlement upon her, or for the purposes of the marriage, is an ademption of a legacy to the daughter. *Lord Durham v. Wharton*, 3 Cl. & F. 146; see *Nevin v. Drysdale*, 4 Eq. 517.

But a gift to the husband absolutely, though expressed to be a portion for a daughter, is not an ademption of a legacy to the daughter and her children. *Ravenscroft v. Jones*, 32 B. 669; *Cooper v. Macdonald*, 16 Eq. 258; see *McClure v. Evans*, 6 W. R. 423.

An absolute gift may adeem a legacy given with executory gifts over.  
The fact that the legacy to the child is given over in certain events will not prevent a subsequent gift to the child absolutely, or a settlement upon her marriage from adeeming the legacy, both as regards the child and the persons interested under the gift over. *Twining v. Powell*, 2 Coll. 262; *Dawson v. Dawson*, 4 Eq. 504; *Cooper v. Macdonald*, 16 Eq. 258.

An adeemed legacy is not revived by a codicil republishing the will. *Powys v. Mansfield*, 3 M. & Cr. 376; see *Ravenscroft v. Jones*, 4 D. J. & S. 228.

Advances made before the date of the will.  
An advance made before the date of the will will not operate as an ademption in the absence of a special agreement that it shall. *Upton v. Prince*, Cas. temp. Talb. 71; *In re Peacock's Estate*, 14 Eq. 236; *Taylor v. Cartwright*, 41 L. J. Ch. 529.

Legacies given for a purpose are adeemed if the testator satisfies the purpose.  
Where a legacy is given for a particular purpose or in satisfaction of a moral obligation, whether to a stranger or not, and the testator afterwards in his lifetime satisfies the purpose or obligation, the legacy is adeemed. *Debeze v. Mann*, 2 B. C. C. 519; *Monck v. Monck*, 1 Ba. & Be. 298; *Powys v. Mansfield*, 3 M. & C. 359; *In re Pollock*; *Pollock v. Worrall*, 28 Ch. D. 552.

But it must appear on the face of the will that the legacy is for a particular purpose. *Pankhurst v. Howell*, 6 Ch. 136.

Directions as to advances.  
II. In some cases the will contains directions that advances are to be deducted from the shares of legatees.

Advances recited to have been made.  
Where the testator recited that he had paid £5000 for his son-in-law and directed that if the son-in-law should not before

the testator's death have repaid £5000 at least, that sum should be taken in part payment of a legacy to the son-in-law, and £5000 had not in fact been paid for the son-in-law, it was held that the legacy was to be reduced only by the amount actually paid. *In re Taylor's Estate; Tomlin v. Underhay*, 22 Ch. D. 495. Chap. XLVII.

In other cases legatees have been held bound by recitals as to the amount of advances and by entries in ledgers referred to by the testator. *In re Aird's Estate; Aird v. Quick*, 12 Ch. D. 291; *Quihampton v. Going*, 24 W. R. 917.

But entries made subsequent to the date of the will cannot be incorporated into it, and made binding on the legatee, though they are admissible as evidence that advances were made by the testator. *Smith v. Conder*, 9 Ch. D. 170; *Whateley v. Spooner*, 3 K. & J. 542. Entries subsequent to date of will.

Where advances are directed to be brought into account evidence is not admissible to show that the testator, some time after an advance, had written off a portion of the advance as a gift. *Smith v. Conder*, 9 Ch. D. 170.

A direction to deduct advances from shares of residue does not affect a residuary legatee's right to a general legacy given him by the will. *Smith v. Crabtree*, 6 Ch. D. 591.

A sum not payable to the testator till after his death is not within a direction to bring advances into hotchpot. *Auster v. Powell*, 1 D. J. & S. 99. Sum due after testator's death.

If the legatee has become bankrupt and the testator proved in the bankruptcy for a debt due from him, so much of the debt as remains unpaid must be brought into account. *Auster v. Powell*, 1 D. J. & S. 99; see *Silverside v. Silverside*, 25 B. 340. Legatee bankrupt.

Where the income of a legatee was directed to be made up to a certain amount, the legatee to certify her income from all sources, it was held that the legatee was not bound to bring into account an annuity given by a subsequent testator with a direction that it was not to be taken into account, but was to be a clear beneficial addition. *In re Hedges's Trust Estate*, 18 Eq. 419.

A direction to deduct a sum from the share of a legatee as an equivalent for an estate given to him fails if the estate is not purchased. *Nugee v. Chapman*, 29 B. 288.

**Chap XLVII.** Under a direction to deduct advances made to a legatee by her brothers or sisters, debts owing from the legatee to her brothers and sisters may be deducted though barred by the statute. *Poole v. Poole*, 7 Ch. 17.

Where the testator directed his sons to pay or account for debts owing to him before they should receive their shares, and the share of a son was settled by a codicil, it was held that a debt due from the son was to be brought into account for the purpose of division, but not for the purpose of increasing the amount to be settled. *White v. Turner*, 25 B. 505.

When hotchpot clause ceases to operate.

Where the residue was given to the testator's children by a first and second wife to vest at twenty-one, with a direction that if the children by the first wife should become entitled to another fund they should bring it into hotchpot, it was held that the hotchpot clause ceased to operate when the eldest child attained twenty-one. *Stares v. Penton*, 4 Eq. 40.

Lapsed share.

Where the testator directed his children, who were his residuary legatees, to bring advances into hotchpot, and a share given to one of the children was revoked and lapsed, it was held that the hotchpot clause applied to the lapsed share, and that the son, whose share was revoked, could not claim as next of kin without bringing advances into hotchpot, but not so as to increase the widow's share. *Stewart v. Stewart*, 15 Ch. D. 539.

Interest on advances.

In the case of direct gifts where advances made by the testator are directed to be deducted from a legatee's share, interest at 4 per cent. on such advances must be computed from the testator's death. *Andrewes v. George*, 3 Sim. 393; *Hilton v. Hilton*, 14 Eq. 468; *Field v. Seward*, 5 Ch. D. 538; see *Poole v. Poole*, 7 Ch. 17.

If the testator directs the advances to be deducted with interest at 5 per cent., interest at that rate will be computed down to the testator's death and at 4 per cent. from that date. *Stewart v. Stewart*, 15 Ch. D. 539.

In the case of gifts in remainder interest must be computed from the death of the tenant for life. *In re Rees*; *Rees v. George*, 17 Ch. D. 701; but see *Limpus v. Arnold*, 13 Q. B. D. 246; affd. 15 Q. B. D. 300.

As between the tenant for life and an advanced child whose

advance with interest is directed to be taken in full or part Chap. XLVII.  
satisfaction of his share, it has been held that the child is bound  
to pay the tenant for life interest on the advance. *Limpus v.*  
*Arnold*, 13 Q. B. D. 246; affd. 15 Q. B. D. 300.

Under the ordinary hotchpot clause life and reversionary  
interests must be brought into account. *Eales v. Drake*, 1  
Ch. D. 217.

In the case of appointments under powers, hotchpot clauses  
will not be implied.

Thus, an appointment in favour of an object "as and for her  
share" does not exclude that object from sharing in the unap- Appointment  
"as and for  
her share."  
pointed part, though the sum left unappointed is such as would  
give all the objects equal shares. *Wilson v. Piggott*, 2 Ves. jun.  
351; *Wombwell v. Hanrott*, 14 B. 143; *Walmsley v. Vaughan*,  
1 De G. & J. 114.

And it seems a direction that the appointed share is in lieu Share in lieu  
of claims.  
of all claims and demands of the donee to or for her original  
share in the trust fund will not exclude her from the unap-  
pointed part. *Foster v. Cautley*, 6 D. M. & G. 55.

On the other hand, an appointment to one object, coupled  
with a declaration that the donee of the power wishes the fund  
equally divided, may amount to an appointment of the rest of  
the fund to the other objects. *Fortescue v. Gregor*, 5 Ves. 553.

And a direction for accruer which can only have a meaning  
on the supposition that the fund has been appointed in favour  
of other objects, may also amount to an appointment. *Foster*  
*v. Cautley*, 6 D. M. & G. 55.

In the case of a deed, if the appointee is a party and a share  
is appointed to him in lieu of his share in the fund, the appointee  
cannot share in the unappointed part. *Clune v. Apjohn*, 17  
Ir. Ch. 25; *Armstrong v. Lynn*, 1 R. 9 Eq. 186.

Under a gift to several persons as A. shall appoint with a gift  
in default of appointment to them equally, a direction to bring  
advances into hotchpot applies only to the unappointed portion  
of the fund. *Brocklehurst v. Flint*, 16 B. 100.

## CHAPTER XLVIII.

## INTERESTS UNDISPOSED OF.

## LAPSE.

**Chap. XLVIII.** PORTIONS of a testator's property may be undisposed, either because the disposition attempted by him has failed, or because no disposition has been attempted.

**Doctrine of lapse.** A devise or legacy, whether it be of a debt due to the testator or not, lapses by the death of the devisee or legatee before the testator, or even before the date of the will. *Elliott v. Davenport*, 1 P. Wms. 83 ; 2 Vern. 581 ; *Maybank v. Brooks*, 1 B. C. C. 84.

**Confirmation by codicil.** Confirmation by codicil of a will containing a legacy to a legatee, her executors and administrators, where the legatee has died since the date of the will, does not prevent a lapse or give the legacy to the executors of the legatee. *Hutcheson v. Hammond*, 3 B. C. C. 127 ; *Maybank v. Brooks*, 1 B. C. C. 83.

**Gift to tenants in common by name.** Where the gift is to several named persons as tenants in common, the shares of any who die before the testator lapse. *Page v. Page*, 2 P. Wms. 489 ; *Peat v. Chapman*, 1 Ves. sen. 542.

**Person dead at date of will.** Possibly, if one of the named persons is shown on the face of the will to be dead at the date of the will, the fund would be divisible among the others. *Clarke v. Clemmans*, 36 L. J. Ch. 171.

So a devise by A. to the uses of B.'s will can only take effect in favour of those who survive A. *Culsha v. Cheese*, 7 Ha. 245.

The doctrine of lapse applies to a power of appointment exercised by will, and the appointee must survive the donee of

the power in order to take. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 61; *Freeland v. Pearson*, L. R. 3 Eq. 658; *In re Susanni's Trusts*, 47 L. J. Ch. 65. Chap. XLVIII.

An appointment by will in accordance with a covenant is subject to the ordinary rule as to lapse. *Re Brookman's Trust*, 5 Ch. 182; see *Jervis v. Wolferstan*, 18 Eq. 18.

If a testator appoints under a power sums exceeding the amount of the fund and one of the appointees pre-deceases him the other appointees are entitled to the benefit of the lapse. *Eales v. Drake*, 1 Ch. D. 217. Appointment  
in excess of  
fund.

A gift to a debtor of his debt, though the debt be given to him, his executors and administrators, with a direction to hand over the securities to him, is in effect a legacy, and lapses by the death of the debtor in the testator's lifetime. It is immaterial whether the debt is given or forgiven. *Toplis v. Baker*, 2 Cox. 118; *Elliott v. Davenport*, 1 P. Wms. 83; 2 Vern. 521; *Maitland v. Adair*, 3 Ves. 231; *Izon v. Butler*, 2 Pr. 34. Gift to  
debtor.

Possibly, a general direction to hand over the security to be cancelled might release the debt, whether the debtor survives the testator or not. *Sibthorp v. Moxom*, 3 Atk. 580; 1 Ves. sen. 49; see *South v. Williams*, 12 Sim. 566.

With regard to legacies to creditors of the testator in discharge of debts which have been released by the operation of the bankruptcy laws or by lapse of time:— Legacies  
to creditors  
whose debts  
are barred.

1. A gift to the official assignee in bankruptcy in trust to pay debts will not fail as regards creditors who die in the testator's lifetime, though the debts are barred by the Statute of Limitations as well as discharged by a certificate in bankruptcy. *In re Sowerby's Trusts*, 2 K. & J. 630; 7 D. M. & G. 429; *Turner v. Martin*, 5 W. R. 277; 3 Jur. N. S. 397.

2. Nor will the gift of a sum to be divided among creditors, though the debts may be barred by the Statute of Limitations, if they have not been released by the creditors. *Williamson v. Naylor*, 3 Y. & C. Ex. 208; *Phillips v. Phillips*, 3 Ha. 281.

3. On the other hand, if the gift is not through the medium of the assignee and the debts have been released or extinguished, the gift is mere bounty, and will fail as regards the creditors

**Chap. XLVIII.** dying in the testator's lifetime: *Coppin v. Coppin*, 2 P. Wms. 295; but the authority of this case is very doubtful. And see *Golds v. Greenfield*, 2 Sm. & G. 476.

**Effect of a declaration against lapse.** A declaration that a legacy shall not lapse is not sufficient to prevent lapse, unless it is clear that it is to go to the estate of the legatee in the event of his death. *Pickering v. Stamford*, 3 Ves. 493; *Johnson v. Johnson*, 4 B. 318; *Underwood v. Wing*, 4 D. M. & G. 633; see *Wilder's Trusts*, 27 B. 418.

But a gift to A. and his executors or administrators with a direction that the legacy is not to lapse has been held sufficient. *Sibley v. Cook*, 2 Atk. 572.

On the other hand, in the case of a gift in similar terms, a direction that the legacy was to vest from the date of the will was held insufficient to prevent lapse. *Browne v. Hope*, 14 Eq. 343.

**Interests of persons to take in default of appointment.** The interest of persons taking in default of appointment does not fail by the death of the donee of the power before the testator. *Hardwick v. Thruston*, 4 Russ. 380; *Edwards v. Saloway*, 2 Ph. 625; *Nicholls v. Haviland*, 1 K. & J. 504; *Kellett v. Kellett*, 1 R. 5 Eq. 298.

**Interests of persons in remainder not affected by lapse of the life interest.** Nor do the interests of those taking in remainder, though they may be the next of kin of the tenant for life, unless the subsequent limitations are only a settlement of the shares to which the legatees actually become entitled. Cases *supra*, and *Meyer v. Townshend*, 3 B. 443; *In re Speakman*; *Unsworth v. Speakman*, 4 Ch. D. 620; *Stewart v. Jones*, 3 De G. & J. 532; *In re Roberts*; *Tarleton v. Bruton*, 27 Ch. D. 346; perhaps *Baker v. Hanbury*, 3 Russ. 340.

**Whether a gift to A. or his executors will lapse.** It is clear that a gift to A. or his executors for the benefit of his estate after a life interest, or where the payment is postponed, will fail by the death of A. before the testator: *Bone v. Cook*, M'Clel. 168; 13 Pr. 332; *Corbyn v. French*, 4 Ves. 418; *Tidwell v. Ariel*, 3 Mad. 403, where heirs was read as executors and administrators. *Leach v. Leach*, 35 B. 185.

This rule, however, does not apply where the gift is to A. or his heirs after a life interest, where heirs means next of kin, who take beneficially and not as mere representatives. *In re Porter's Trusts*, 4 K. & J. 188.

But it would seem a direct gift to A. or his executors, if Chap. XLVIII. executors is construed in its literal sense, would not lapse by A.'s death before the testator. See *Maxwell v. Maxwell*, I. R. 2 Eq. 478; see, however, *Aspinall v. Duckworth*, 35 B. 307; and *ante*, p. 268.

If there is a gift to A. charged with a sum payable to B., the legacy to B. does not lapse by the death of A. before the testator. Charges will not fail by the death of the devisee subject to the charge. *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; *Oke v. Heath*, 1 Ves. sen. 134.

But the legacy would fail if the gift to A. is adeemed or revoked. *Cowper v. Mantell*, 22 B. 223.

And where land was devised to a creditor on condition that he should release his debt, and the testator declared that the debt should not be paid out of residue, the debt was held charged on the land, though the creditor predeceased the testator. *In re Kirk*; *Kirk v. Kirk*, 21 Ch. D. 431.

Now, by section 32 of the Wills Act, a devise of an estate tail will not lapse if there are at the death of the testator any issue inheritable under the entail. Effect of sections 32 and 33 of the Wills Act on the doctrine of lapse.

And, by section 33, a gift of real or personal property to a child, or other issue of the testator, will not lapse if any issue of the devisee or legatee survive the testator.

The section applies to a gift to a child dead at the date of the will. *Wisden v. Wisden*, 2 Sm. & G. 396.

The issue surviving the testator need not be living at the death of the devisee or legatee. *In bonis Parker*, 1 Sw. & Tr. 523.

In such a case the property bequeathed belongs to the legatee as if he had survived the testator, and passes by his will. *Johnson v. Johnson*, 3 Ha. 157; *In bonis Parker*, 1 Sw. & Tr. 523; *Re Mason's Will*, 34 B. 494.

If the devisee dies intestate her husband is entitled to an estate by the curtesy. *Eager v. Furnivall*, 17 Ch. D. 115.

If the legatee devises to the testator there is a lapse and the heir at law or next of kin of the legatee are entitled. *In re Hensler*; *Jones v. Hensler*, 19 Ch. D. 612.

Property preserved from lapse by this section is not within a covenant to settle property coming to the legatee during Covenant to settle.

Chap. XLVIII. coverture. *Pearce v. Graham*, 11 W. R. 415; 32 L. J. Ch. 359.

Where the testator directed a daughter's share to be settled if she survived him, and she predeceased him leaving issue, it was held that the direction to settle applied to her share. *In re Hone's Trusts*, 22 Ch. D. 663.

Section 33 applies to gifts under general powers of appointment, though there is a gift over in default of appointment. *Eccles v. Cheyne*, 2 K. & J. 676.

It does not apply to special powers, nor to cases where before the Act there would have been no lapse; as, for instance, gifts to a class. *Griffiths v. Gale*, 12 Sim. 354; *Freeland v. Pearson*, L. R. 3 Eq. 658; *Olney v. Bates*, 3 Dr. 319; *Browne v. Hammond*, Johns. 210; *Holyland v. Lewin*, 26 Ch. D. 266.

These sections apply to the interest of a person dying before the date of the will, but after the Act came into operation, but not to a person dying before the Act came into operation. *Winter v. Winter*, 5 Ha. 306; *Mower v. Orr*, 7 Ha. 473; *Wild v. Reynolds*, 5 Notes of Cases, 1.

Doctrine of  
lapse in the  
case of gifts  
to a class.  
Direction  
to settle.

In the case of gifts to a class as tenants in common, the shares of members of the class dying before the testator do not lapse but go to the other members of the class.

A direction to settle the share to which any member of a class *shall become* entitled will not have the effect of preventing the shares of members dying before the testator from going to the other members. *Stewart v. Jones*, 3 De G. & J. 532.

A distinction has been drawn between such a direction and a direction to settle a daughter's "share" simply; and it has been held that in the latter case the legacy does not lapse by the death of the daughter before the testator. *In re Speakman*; *Unsworth v. Speakman*, 4 Ch. D. 620; this case was, however, disapproved and not followed in *In re Roberts*; *Tarleton v. Bruton*, 27 Ch. D. 346.

In the same way a gift to the children of A. as tenants in common, to be vested at twenty-one, is in effect a gift to the children who attain twenty-one. *Re Colley's Trusts*, L. R. 1 Eq. 496.

A direction that the shares of any members of the class who die before the testator, leaving issue, shall not lapse, will not have the effect of causing the shares of those who die before the testator without issue to lapse. *Aspinall v. Duckworth*, 35 B. 307. Chap. XLVIII.

It is immaterial that the class may be so determined as to be incapable of increase; as, for instance, if the class is "my nephew and nieces living at the time of my husband's decease," as tenants in common. *Dimond v. Bostock*, 10 Ch. 358; *Lee v. Pain*, 4 Ha. 201, 250; *Leigh v. Leigh*, 17 B. 605. Gift to a class incapable of increase.

And no person incapacitated from taking at the death of the testator is looked upon as a member of the class, so that, for instance, the share of a member of the class incapacitated from taking because he witnessed the will, goes to the other members. *Young v. Davies*, 2 Dr. & Sm. 167; *Fell v. Biddulph*, L. R. 10 C. P. 701; *In re Coleman and Jarrom*, 4 Ch. D. 165. No person incapable at the testator's death of taking is a member of the class.

This doctrine does not apply to cases where property is appointed under a power to objects and non-objects. In such cases the objects of the power only take the shares they would have taken if the whole appointment had been valid and the rest goes as in default. *Harvey v. Stracey*, 1 Dr. 137; *In re Farncombe's Trusts*, 9 Ch. D. 652. Appointment to object not capable of taking.

When there is a gift to a class the revocation of the gift to one of the members of the class does not cause a lapse, but the whole goes to the other members of the class. *Shaw v. MacMahon*, 4 D. & War. 431. Revocation of the share of a member of the class.

And a gift of residue to several persons and to A. if living, or to several persons and to such of the children of A. as are living at the date of the will, does not lapse as to the share of A. or the children of A. if A. is dead, or there are no children living at the date of the will. *Re Hornby*, 7 W. R. 729; *In re Spiller*; *Spiller v. Madge*, 18 Ch. D. 614; see *Sanders v. Ashford*, 28 B. 609.

A gift of aliquot shares to several named persons as tenants in common is not a gift to a class, and the shares of any dying before the testator lapse. *Cresswell v. Cheslyn*, 2 Ed. 123; *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129. Gift of aliquot shares to named persons.

Nor is a gift to a class of persons "before mentioned," the

Chap. XLVIII. persons having been previously named, a gift to a class. *Re Gibson*, 2 J. & H. 656.

A gift to "the five daughters" of A., or to "my nine children," is not a gift to a class. *In re Smith's Trusts*, 9 Ch. D. 117; *In re Stansfield*, 15 Ch. D. 84.

Whether a gift to named executors is subject to lapse.

A gift to "my executors herein-named" has been held a gift to a class, the gift being attached to the office and therefore passing wholly to those who survive to perform the office. *Knight v. Gould*, 2 M. & K. 295.

But this is not the case if the gift, though the donees happen to be executors, is not given to them in respect of their office. *Barber v. Barber*, 3 M. & Cr. 688; *Hoare v. Osborne*, 12 W. R. 397.

The result is the same if the gift is to a class the members of which are then named. *Bain v. Lescher*, 11 Sim. 397.

And a gift to my wife's brother and sister and my brothers and sister equally, when the testator had at the date of the will three brothers and one sister, was held a *designatio personarum*, and the shares of two brothers who died before the testator lapsed. *Havergal v. Harrison*, 7 B. 49.

Gift to a class and a named individual

It is clear that a gift to A., and the children of B., may in effect be a gift to a class, if the testator treats the legatees as a class. *Re Stanhope's Trust*, 27 B. 201; *In re Jackson*; *Shiers v. Ashworth*, 25 Ch. D. 162.

And a direction to include an individual in the class does not make it the less a class, as in a gift equally to all my children, including W. *Shaw v. MacMahon*, 4 Dr. & War. 431.

On the other hand, a gift to surviving children and W. is not a gift to a class, and the share of W. will lapse by his death before the testator. *Drakeford v. Drakeford*, 33 B. 43; *Re Chaplin's Trust*, 12 W. R. 147; 33 L. J. Ch. 183; *Aspinall v. Duckworth*, 35 B. 307; *In re Allen*; *Wilson v. Atter*, 44 L. T. N. S. 240; 29 W. R. 480. See *Clark v. Phillips*, 17 Jur. 886; *In re Featherstone's Trusts*, 22 Ch. D. 111.

In such a case, however, if there is a direction that the interests are to be vested at the testator's death, there will be no lapse, but the gift goes to those only who survive the testator. *In re Featherstone's Trusts*, 22 Ch. D. 111.

RESULTING TRUSTS.

When an estate is devised subject to a charge, and the purpose for which the charge is created fails, the charge sinks for the benefit of the devisee. *A.-G. v. Milner*, 3 Atk. 112, *Jackson v. Hurlock*, Amb. 487; 2 Ed. 263; *King v. Denison*, 1 V. & B. 261; *Tucker v. Kayess*, 4 K. & J. 339; *Heptinstall v. Gott*, 2 J. & H. 449.

Devise subject to a charge which fails.

Where the devise is clearly subject to a charge it makes no difference that the money to be raised by the charge is given to purposes such as a charity, which, if valid, would in all events give it away from the devisee. *Baker v. Hall*, 12 Ves. 497; *Cooke v. Stationers' Company*, 3 M. & K. 262.

But where there is no express charge it must depend upon the general intention whether the particular gift is a charge, or whether the devisee was intended to take only what remains after deducting the particular gift.

Whether the devisee takes subject to, or what remains after satisfying charge.

1. Thus if the lands are not expressly charged, but the devisee is directed to pay a certain sum, there has been held to be a resulting trust. *Arnold v. Chapman*, 1 Ves. Sen. 108; *Bland v. Wilkins*, cit. 1 B. C. C. 61.

Direction to pay a certain sum.

2. If a sum is directed to be raised, and a full disposition is made of it, for instance to a charity, in such a way that the disposition, if valid, must in all events give the money away from the devisee of the land, who is to take only from and after the raising the money, there is a resulting trust for the heir upon failure of the particular disposition. *Tregonwell v. Sydenham*, 3 Dow. 194.

Direction to raise a sum which is disposed of in all events.

But, if the money to be raised is given for purposes which, though valid, may not take effect, the mere fact that the land is not given till after raising the money will not take the money from the devisee if those purposes fail. *In re Cooper's Trusts*, 23 L. J. Ch. 25; 4 D. M. & G. 757.

And where land was devised for life and in tail after the expiration or other sooner determination of a term of ninety-nine years limited to trustees, of which no trusts were declared, actual enjoyment by the devisee being intended, the devisees

**Chap. XLVIII.** were held to be subject to the term. *Sidney v. Shelley*, 19 Ves. 352.

Distinction  
between a  
charge created  
by the will  
and by a  
prior instru-  
ment.

Where a testator has by a previous instrument a power to charge real estates and exercises the power by will, the above rules have no application. In such a case, if the disposition made by the will fails, the charge is nevertheless raisable. *Simmons v. Pitt*, 8 Ch. 978.

Devise  
subject to  
and upon  
trusts.

Upon the same principle, where there is a devise *subject to* trusts, the devisee takes the whole if those trusts fail, whereas a devise *upon* trusts which fail is undisposed of. *Clarke v. Hilton*, L. R. 2 Eq. 810; *Fenton v. Hawkins*, 9 W. R. 300; *Briggs v. Penny*, 3 Mac. & G. 546.

#### ACCELERATION.

Acceleration.

In the case of a devise to a person for life with remainder in fee, where the tenant for life is incapable of taking or is not in *rerum natura*, the remainder is valid and will be accelerated. Yearbook, 9 Henry VI. fo. 24 b.; Perkins, sec. 566, 567.

The same rule applies in the case of personalty. *Jull v. Jacobs*, 3 Ch. D. 703.

Revocation  
or forfeiture.

The rule applies if the life estate is revoked by the testator or determined by a forfeiture clause. *Lainson v. Lainson*, 18 B. 1; 5 D. M. & G. 754; *Evestaff v. Austin*, 19 B. 591; *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296; *In re Love*; *Green v. Tribe*, 47 L. J. Ch. 783. See, too, *Stephenson v. Stephenson*, 52 L. T. 576.

Powers of  
sale and  
charging.

In the same way, powers of sale will be accelerated, but not powers to charge. *Truell v. Tysson*, 21 B. 437.

Whether  
there is any  
distinction as  
regards  
acceleration  
between  
appointments  
and devises.

There is no distinction as regards acceleration between appointments and devises: *Craven v. Brady*, *supra*; though if the object of an appointment which is void is to benefit the persons who would take in default of appointment, and a remainder is well appointed, the remainder will not be accelerated. *Crozier v. Crozier*, 3 D. & War. 353.

Where a remainder is limited after a contingent interest there is an intestacy until it is ascertained whether the contingent interest will take effect or not. *Wade Gery v. Hundley*, 1 Ch.

D. 653; 3 Ch. D. 374; *Andrew v. Andrew*, 1 Ch. D. 410; see Chap. XLVIII.  
*Carrick v. Errington*, 2 P. Wms. 361; *D'Eyncourt v. Gregory*,  
 34 B. 36.

#### WHO ARE ENTITLED TO INTERESTS UNDISPOSED OF.

Interests undisposed of in realty and personalty pass to the heir-at-law or next of kin, as the case may be.

Directions excluding the heir-at-law or next of kin from any share in the testator's property will, as a general rule, be taken to have been inserted only for the purpose of the dispositions made by the will and will not exclude the heir-at-law or next of kin from taking property undisposed of. The cases on this subject are, however, not easy to reconcile.

Thus, where the testatrix directed her real and personal estate to be sold and declared that no part of the fund should in any event lapse for the benefit of the heir-at-law and showed an intention of disposing of the property by a codicil, the heir was held entitled to the proceeds of sale of real estate not disposed of. *Fitch v. Weber*, 6 Ha. 145.

According to the older cases, a gift to the testator's widow in lieu of all claims upon his estate or in lieu of thirds, does not deprive her of a share in property undisposed of.

This has been so held where a complete disposition was attempted to be made by the testator. *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581; 3 Ves. 332, 492.

And the same rule has been applied in cases where there was on the face of the will an intestacy. *Johnson v. Johnson*, 4 B. 318; *Tavernor v. Grindley*, 32 L. T. N. S. 424.

Possibly, if the words of exclusion are large and comprehensive and there is an intestacy on the face of the will, a gift in lieu of all claims and demands would exclude the widow from a share in property undisposed of. *Lett v. Randall*, 3 Sm. & G. 83.

Upon similar principles, a direction that one of the next of kin shall take no share in the testator's property will not prevent him from taking his share under the Statutes of Distribution. *Johnson v. Johnson*, 4 B. 318; *Sykes v. Sykes*, 4 Eq.

Chap. XLVIII. 200; 3 Ch. 301; see *Ramsay v. Shelmerdine*, 1 Eq. 129; *Gould v. Gould*, 32 B. 391.

A limitation to the next of kin of a married woman, as if she had died unmarried, will not exclude the husband's title as administrator if there are no next of kin. *Hawkins v. Hawkins*, 7 Sim. 173.

Gift to child  
of certain  
property  
and no  
more.

On the other hand, a gift to a child of "ten shillings and no more," has been held to bar the child's right as next of kin where no disposition was attempted to be made by the will. *Breton v. Vachell*, 5 B. P. C. 51; 11 Vin. Ab. 185.

And a clause excluding some of the next of kin may be so framed as in effect to amount to a gift to the others. *Bund v. Green*, 12 Ch. D. 819; see *In re Taylor*; *Taylor v. Ley*, W. N. 1885, 6.

Escheat.

If the testator dies without an heir, lands undisposed of by him in which he has the legal estate pass by escheat to the lord of whom they are held, if he can be ascertained, or if not to the Crown. *Viscount Downe v. Morris*, 3 Ha. 394; *Rogers v. Maule*, 1 Y. & C. C. 4; *Thraxton v. A.-G.*, 1 Vern. 340; Co. Lit. 18, b.; *May v. Street*, Cro. Eliz. 120.

Intestates  
Estates Act,  
1884.

The Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), enacts that after the 14th August, 1884, "where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament whether devised or not to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest, above-mentioned, were a legal estate in corporeal hereditaments."

Effect of Act  
on rent-  
charge.

Before the Act, if the owner of a rent-charge died without heirs, the rent-charge merged in the land. Co. Lit. 299 b., note 261.

Is the effect of the Act to keep a rent-charge alive for the benefit of the lord of the manor?

Equitable  
estates on  
failure of  
heirs.

In cases not affected by this Act, if a testator who dies intestate and without an heir has an equitable estate in land, the person in whom the legal estate is vested, whether as trustee or mortgagee, is entitled to the lands. *Burgess v. Wheate*, 1 Ed.

177; *A.-G. v. Sands*, 2 Freem. 129; *Hardres*, 488; *Beale v. Symonds*, 16 B. 406. Chap. XLVIII.

The trustee is beneficially entitled, though the land may be devised on trust for sale. *Walker v. Denne*, 2 Ves. jun. 170; *Taylor v. Haygarth*, 14 Sim. 8; *Cox v. Parker*, 22 B. 168. The trustee takes when there is no heir.

Where lands held by trustees for the testator are devised to other trustees, the latter are entitled upon failure of the trusts if there is no heir of the testator. *Onslow v. Wallis*, 1 Mac. & G. 506.

In the case of copyholds the heir of a trustee who has not been admitted is entitled as against the lord. *Gallard v. Hawkins*, 27 Ch. D. 298.

In the case of chattels real and personal the Crown and not the trustee is entitled on failure of next of kin. *Cradock v. Owen*, 2 Sm. & G. 241; *Powell v. Merritt*, 1 ib., 381; *Read v. Stedman*, 26 B. 495; *Johnstone v. Hamilton*, 11 Jur. N. S. 777. The Crown takes in default of next of kin.

If next of kin afterwards establish a title, the Crown cannot be charged with interest on what it has received while in possession of the property. *In re Gosman*, 17 Ch. D. 771.

Estates *pur autre vie* descend either to the heir-at-law or executor, according to the limitations contained in the latest instrument affecting the estate. *Croker v. Brady*, 4 L. R. Ir. 653. Estates *pur autre vie*.

Under section 6 of the Wills Act, estates *pur autre vie*, of a freehold nature, given to a man and his heirs, pass, if undisposed of, to the heir subject to debts. If there is no heir they pass to the executor as part of the personal estate, whether the interest is legal or equitable. *Plunket v. Reilly*, 2 Ir. Ch. 585; *Reynolds v. Wright*, 25 B. 100; 2 D. F. & J. 590.

If there is no special occupant, the executor is entitled.

An estate *pur autre vie* limited to A. and his heirs and devised by A. to trustees their executors and administrators, on trust for B., passes on B.'s death intestate to his executor. *Croker v. Brady*, 4 L. R. Ir. 653.

Chap. XLVIII.

## RESIDUE UNDISPOSED OF.

Effect of  
Lord St.  
Leonards'  
Act.

Since Lord St. Leonards' Act, 11 Geo. 4 and 1 W. 4, c. 40, which controls the wills of testators dying after Sept. 1, 1830, the executors take the residue undisposed of for the benefit of the next of kin, unless a contrary intention is expressed in the will, parol evidence not being admissible. *Juler v. Juler*, 29 B. 34; *Love v. Gaze*, 8 B. 472.

Contrary  
intention  
within the  
Act.

Such contrary intention does not sufficiently appear by the mere fact that the testator shows that he conceived himself to have disposed of the residue. *Travers v. Travers*, 14 Eq. 275.

But if the testator appoints three of his children executors without expressly giving them any beneficial interest and gives reasons why he has not provided by his will for his other children, the executors will take the residue beneficially. *Harrison v. Harrison*, 2 H. & M. 237.

The Act only  
applies where  
the will  
contains no  
gift of the  
residue.

The Act applies only where the executor would otherwise have taken the undisposed residue; it does not therefore apply where there is an express devise of the residue, whether on trusts which do not exhaust the whole or otherwise. *Saltmarsh v. Barrett*, 29 B. 474; 3 D. F. & J. 279; *Neo v. Neo*, L. R. 6 P. C. 381; *Williams v. Arkle*, L. R. 7 H. L. 606.

Where there  
are no next of  
kin the Act  
does not  
apply.

If, however, there are no next of kin, Lord St. Leonards' Act does not apply and the executors will take the undisposed residue, unless a contrary intention is indicated, in which case it will go to the Crown. *Middleton v. Spicer*, 1 B. C. C. 201; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; *Taylor v. Haygarth*, 14 Sim. 8; *In re Knowles*; *Roose v. Chalk*, 28 W. R. 975.

The title of  
executors in  
cases under  
the old law.

It becomes, therefore, necessary to consider in what cases executors would have been held excluded from the residue undisposed of under the old law.

1. They take only such residue as the testator did not intend to dispose of.

They do not  
take lapsed  
or void  
legacies.

a. They do not take legacies which have lapsed or are void. *Bennett v. Batchelor*, 3 B. C. C. 28; *A.-G. v. Tomkins*, AmbL. 216.

Nor residue  
given on  
trust.

b. Nor do they take where the whole is expressly given to them on trusts which are void: *Dacre v. Patricson*, 1 Dr. &

Sm. 182; *Johnston v. Hamilton*, 11 Jur. N. S. 777; or not Chap. XLVIII. exhaustive: *Dawson v. Clark*, 18 Ves. 247; *Mapp v. Elcock*, 2 Ph. 793; 3 H. L. 492; or not declared. *Milnes v. Slater*, 8 Ves. 295; *Taylor v. Haygarth*, 14 Sim. 8; *Cradock v. Owen*, 2 Sm. & G. 241; *Read v. Steadman*, 26 B. 495; *Vezey v. Jamson*, 1 S. & St. 69; *Chester v. Chester*, 12 Eq. 444.

The fact, however, that the executors are made trustees for some particular and limited purpose does not affect their title to the residue. *Batteley v. Windle*, 2 B. C. C. 31; *Griffiths v. Hamilton*, 12 Ves. 299; *Pratt v. Sladden*, 14 Ves. 193.

2. And even when the property is not given to the executors upon trust, if they are appointed to carry out the will, or are treated as undertaking a duty and not receiving a benefit, they take as trustees. *Androvin v. Poilblanc*, 3 Atk. 299; *Braddon v. Farrand*, 4 Russ. 87; *Giraud v. Hanbury*, 3 Mer. 150; *Lord North v. Purdon*, 2 Ves. sen. 495; *Dillon v. Reilly*, 9 L. R. Ir. 57.

Executors not entitled to the residue when they are treated as trustees.

But where the trust is only inferential, evidence in favour of the executors will be admitted. *Gladding v. Yapp*, 5 Mad. 56.

3. And a presumption against the executor's title is raised if the testator shows an intention to dispose of the residue, though he may not actually do so: *Bishop of Cloyne v. Young*, 2 Ves. sen. 91; *North v. Purdon*, 2 Ves. sen. 495; *Davers v. Dewes*, 3 P. Wms. 40; *Mordaunt v. Hussey*, 4 Ves. 117; *Mence v. Mence*, 18 Ves. 348; or if he expresses an intention to dispose of part only of his property by his will: *Urquhart v. King*, 7 Ves. 225; or if the property is directed to go according to law. *Cranley v. Hale*, 14 Ves. 307.

Cases where the testator has not intended to dispose of all his property by his will.

In such cases evidence in support of the executor's title is admissible. *Bishop of Cloyne v. Young*, 2 Ves. sen. 91; *Nourse v. Finch*, 1 Ves. jun. 344; 2 Ves. jun. 78.

4. The executor takes as trustee for the next of kin:

a. If there is a legacy to a sole executor, whether general or specific, or whether in possession or reversion, or whether expressed to be for his trouble or not, or whether for life or not, if there is no gift of the remainder. *Nourse v. Finch*, 1 Ves. jun. 343; 2 Ves. jun. 78; *Southcot v. Watson*, 3 Atk. 226; *Seley v. Wood*, 10 Ves. 71; *Oldman v. Slater*, 3 Sim. 84; *Rachfield*

A legacy to a sole executor converts him into a trustee.

**Chap XLVIII.** *v. Careless*, 2 P. Wms. 156; *King v. Denison*, 1 V. & B. 260; *Zouch v. Lambert*, 4 Bro. C. C. 326; *Dick v. Lambert*, 4 Ves. 725.

It makes no difference that the executrix is the testator's wife or relation or that legacies are given to the next of kin. *Randall v. Bookey*, 2 Vern. 425; *Dick v. Lambert*, 4 Ves. 725; *Farrington v. Knightley*, 1 P. Wms. 543; and see note, *ib.*

If the legacy is given in general words parol evidence is admissible in support of the executor's title. *Clennell v. Lewthwaite*, 2 Ves. jun. 465, 644; *Langham v. Sanford*, 17 Ves. 435.

But not if it is given to him expressly for his trouble. *Rachfield v. Careless*, 2 P. Wms. 158.

What legacies will not convert an executor into a trustee.

It seems doubtful whether a contingent reversionary interest would raise a presumption against the executor's title. *Lynn v. Beaver*, T. & R. 63.

A legacy to an executor's wife will not convert him into a trustee for the next of kin. *Wilson v. Ivat*, 2 Ves. sen. 166; *Fruer v. Bouquet*, 21 B. 33.

In these cases the presumption against the executor's title arises from the difficulty of supposing that the testator would have given him something if he meant him to have all. Therefore, if the express legacy can be accounted for on other grounds, no presumption arises. If, for instance, the legacy is an exception out of a larger gift: *Griffith v. Rogers*, 1 Eq. Ab. 245, pl. 8; *Jones v. Westcomb*, Prec. Ch. 316; and this includes the case of a gift to the executor for life, if there is a gift of the remainder: *Granville v. Beaufort*, 1 P. Wms. 114; or if the legacy is to an executrix, a married woman, for her separate use. *Newstead v. Johnson*, 2 Atk. 45; 9 Mod. 242.

Equal legacies to several executors.

*b.* Equal legacies to several executors will also raise a presumption against their title to the residue. *Ommaney v. Butcher*, T. & R. 260; *In re Hudson's Trusts*, 31 W. R. 778; 52 L. J. Ch. 789.

And this presumption, it seems, is not rebutted by the fact that unequal bounty is shown them as regards real estate. *Muckleston v. Brown*, 6 Ves. 52, p. 64.

Legacies to

But legacies to some executors and not to others, or unequal

legacies to all, raise no presumption against them, since the intention may be to favour some more than others. *Griffiths v. Hamilton*, 12 Ves. 299; *Pratt v. Sladden*, 14 Ves. 193; *Bowker v. Hunter*, 1 B. C. C. 328; *Rawlings v. Jennings*, 13 Ves. 39; *Dawson v. Thorne*, 3 Russ. 235; *In re Knowles*; *Roose v. Chalk*, 28 W. R. 975. Chap. XLVIII.  
some executors  
and not to  
others.

If, however, a legacy be given to one of several executors expressly for his trouble they all take as trustees. *White v. Evans*, 4 Ves. 21; *Milnes v. Slater*, 8 Ves. 295. Legacy to one  
of several  
executors for  
his trouble.

But in such a case parol evidence to support their title would be admitted. *Williams v. Jones*, 10 Ves. 77.

5. If it is clear that the executors are appointed not from personal motives, but merely from convenience or because they occupy a particular position, they take as trustees. *Urquhart v. King*, 7 Ves. 224; *De Mazay v. Pybus*, 4 Ves. 644; *Sadler v. Turner*, 8 Ves. 616. Executors  
appointed  
for particular  
reasons.

Evidence in favour of next of kin is not admissible, except to rebut evidence in favour of the executors. *White v. Williams*, 3 V. & B. 72.

## CHAPTER XLIX.

## ADMINISTRATION.

## THE ORDER OF ASSETS.

**Chap. XLIX.** THE order in which the assets of a testator are applied in administration is as follows :—

**I. General personal estate.**

I. The general personal estate. *Manning v. Spooner*, 3 Ves. 117.

1. And as to this, if a specific fund of personalty is charged, it is primarily liable if the residue is disposed of. *Browne v. Groombridge*, 4 Mad. 495; *Choat v. Yeates*, 1 J. & W. 102; *Evans v. Evans*, 17 Sim. 106; *Phillipps v. Eastwood*, 1 Ll. & G. 294; *Webb v. De Beauvoisin*, 31 B. 573; *Vernon v. Earl Mannors*, *ib.* 623; *Longfield v. Bantry*, 15 L. R. Ir. 101.

**Residue undisposed of.**

2. If, however, the residue is undisposed of, the latter is primarily liable. *Holford v. Wood*, 4 Ves. 78; *Hewett v. Snare*, 1 De G. & S. 333; *Newbegin v. Bell*, 23 B. 386; *Corbet v. Corbet*, 1 R. 8 Eq. 407.

3. And generally it would seem that where there is no residuary gift, but there is in fact a residue of which no disposition has been attempted, this is in all cases the primary fund for payment of debts. *Howse v. Chapman*, 4 Ves. 542; *Taylor v. Mogg*, 27 L. J. Ch. 816.

**Legacy given in lieu of a share of residue is payable out of the general personal estate.**

Legacies, however, even if given in lieu of a share of residue, the gift of which is revoked, and thereby becomes undisposed of, are not payable out of the share undisposed of, but out of the general estate. *Sykes v. Sykes*, 4 Eq. 200; 3 Ch. 301; see *Cresswell v. Cheslyn*, 2 Ed. 123; 3 B. P. C. 246; see 1 Sw. 571, *n.*

But the testator may direct it to be paid out of the revoked Chap. XLIX.  
share of residue. *In re Wood's Will*, 29 B. 236; *Walsh v. Walsh*, I. R. 4 Eq. 396.

A specific legacy falling into the residue by reason of lapse Specific legacy  
lapsed.  
bears its rateable proportion with the other residue. *Scott v. Forristall*, 10 W. R. 37; *Morley v. Tunstall*, 7 Eq. 416, n.

5. On the question whether a lapsed share of residue is Whether a  
lapsed share  
of residue is  
applicable  
before a share  
well disposed  
of.  
applicable in payment of debts in priority to a share effectually disposed of:—

a. It is settled that if there is a general charge of debts, a lapsed share only contributes rateably. *Eyre v. Marsden*, 4 M. & Cr. 231; *Burt v. Sturt*, 10 Ha. 415; *Oddie v. Brown*, 4 De G. & J. 179; see *Elborne v. Goode*, 14 Sim. 165; *Ralph v. Carrick*, 5 Ch. D. 984.

b. It may now be taken to be settled that the same rule No charge of  
debts.  
applies where there is no charge of debts. *Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills*, 7 Ch. D. 33; *Blann v. Bell*, 7 Ch. D. 382; overruling so far as *contra Gowan v. Broughton*, 19 Eq. 77; see *In re Jones*; *Jones v. Caless*, 10 Ch. D. 40.

Upon this principle, if a mixed residue of pure and impure personalty is given to a charity, so that the gift fails as regards the impure personalty, the latter will not be the primary fund as against the other portion, the gift of which takes effect, but debts will be payable rateably out of both. *A.-G. v. Lord Winchelsea*, 3 B. C. C. 373; S. C. nom. *A.-G. v. Hurst*, 2 Cox, 364; *Blann v. Bell*, 7 Ch. D. 382.

II. Real estate devised or ordered to be sold for payment of II. Real  
estate devised  
for payment  
of debts.  
debts, whether it descends to the heir or not. *West v. Lawday*, I. R. 2 Eq. 517; *Phillips v. Parry*, 22 B. 279; *Stead v. Hardaker*, 15 Eq. 174.

III. Real estate not charged with debts which descends, be- III. Real  
estate  
descended not  
charged with  
debts.  
cause no disposition has been attempted. *Davies v. Topp*, 1 B. C. C. 527; *Harwood v. Oglunder*, 8 Ves. 125; *Manning v. Spooner*, 3 Ves. 117.

IV. Real estate charged with payment of debts and devised IV. Real  
estate charged  
with debts  
and devised  
or descended  
or descended rateably. *Wood v. Ordish*, 3 Sm. & G. 125; *Peacock v. Peacock*, 13 W. R. 516; 34 L. J. Ch. 315; *Ryves v. Ryves*, 11 Eq. 539; *Stead v. Hardaker*, 15 Eq. 175; *Barber v.*

**Chap. XLIX.** *Wood*, 4 Ch. D. 885; see, however, *Williams v. Chitty*, 3 Ves. 545.

**V. General legacies.**

V. General pecuniary legacies rateably. *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Flower*, 3 Ch. D. 109; see *Hensman v. Fryer*, 3 Ch. 420.

**Whether lapsed legacy is applicable before those effectually given.**

1. As between general legacies the further question may arise if there is no residuary gift, whether a lapsed pecuniary legacy exonerates those that take effect:—

*a.* Where all the legacies are subject to a charge of debts, a lapsed pecuniary legacy only contributes rateably. *House v. Chapman*, 4 Ves. 542.

*b.* Where there is no charge of debts possibly on the principle of *Gowan v. Broughton*, 19 Eq. 77, and *Scott v. Cumberland*, 18 Eq. 578, a lapsed legacy may be primarily applicable; see, however, p. 571, *ante*; and see *In re Ham's Trusts*, 2 Sim. N. S. 106.

**What are general legacies for purposes of abatement.**

2. As to what are general legacies for the purpose of abatement:—

Legacy duty directed to be paid on a specific legacy is a general legacy and abates with the general legacies. *Farrar v. St. Catherine's Coll.*, 16 Eq. 19; see *Wilson v. O'Leary*, 17 Eq. 419; *In re Wilkins*; *Wilkins v. Rotherham*, 27 Ch. D. 703.

And annuities for the purpose of abatement rank with general legacies. *Miller v. Huddleston*, 1 Mac. & G. 513.

**Rent charges.**

A rent charge, however, or annuity issuing out of the land has priority over legacies charged upon the land in the event of deficiency of the personalty. *Creed v. Creed*, 11 Cl. & F. 491; *In re Briggs*; *Briggs v. George*, 29 W. R. 925.

**How the value of annuities is to be calculated.**

In estimating the value of annuities for purposes of abatement their value is to be taken at the time when the estimate is made; thus the value of the annuity of an annuitant who is dead, is the sum of the payments which would have been made to him in respect of it, and the value of a reversionary annuity which has come into possession is its present value according to the Government tables at the time of abatement, *plus* any arrears due upon it. *Todd v. Bielby*, 27 B. 353; *Potts v. Smith*, 8 Eq. 683; *Delves v. Newington*, 52 L. T. 512.

The same rule applies where all the annuitants are living. Chap. XLIX.  
*Heath v. Nugent*, 29 B. 226; *In re Wilkins*; *Wilkins v. Rotherham*, 27 Ch. D. 703.

Where legacies and annuities are charged on real estate, powers of distress and entry conferred upon the annuitants do not give the annuities priority over the legatees. *Roper v. Roper*, 3 Ch. D. 714.

3. Priority of general legacies, *inter se*:—

a. As between general legatees, legacies given for valuable consideration, as for debts or instead of dower, have priority. Legacies for valuable consideration have priority.  
*Blower v. Morrett*, 2 Ves. sen. 420; *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. 258; *Bell v. Bell*, 6 Ir. Eq. 239; *Davies v. Bush*, 1 You. 341; *Stahlschmidt v. Lett*, 1 Sm. & G. 421.

A legacy, however, in lieu of dower, where the testator has no land out of which the widow is dowable, has no priority. *Acey v. Simpson*, 5 B. 35; *Roper v. Roper*, 3 Ch. D. 714.

A legacy to an executor for his trouble has no priority. *Duncan v. Watts*, 16 B. 204.

A legacy to the testator's wife to be paid immediately after his decease has been held to have priority. *In re Hardy*; *Wells v. Barwick*, 17 Ch. D. 798; see, however, *Blower v. Morret*, 2 Ves. sen. 420; *Roche v. Harding*, 7 Ir. Ch. 338.

b. Legacies payable at the death of a tenant for life or at some other future period, do not abate before other legacies. Time of payment creates no priority.  
*Miller v. Huddleston*, 3 Mac. & G. 513; *Street v. Street*, 2 N. R. 56; *Nickisson v. Cockill*, 3 D. J. & S. 622.

The words "in the first place," "in the next place," or the word "afterwards," used in introducing legacies, create no priority between them. Legacies introduced by "firstly," "secondly."  
*Thwaites v. Forman*, 1 Coll. 409; *Beeston v. Booth*, 4 Mad. 161; *Whitehouse v. Insole*, 7 L. T. N. S. 400; see *In re Hardy*; *Wells v. Barwick*, 17 Ch. D. 798.

Annuities to become payable when all the legacies are paid and annuities payable immediately abate *pari passu*. *Ingham v. Daly*, 9 L. R. Ir. 484.

c. But legacies given on the supposition that there will be more than enough to pay prior legacies abate first. Legacies given on supposition of a surplus. *A.-G. v. Robins*, 2 P. Wms. 23; *Stammers v. Halliley*, 12 Sim. 42.

**Chap. XLIX.**

Legacies for life applicable on the death of the legatees.

And a direction that certain legacies given for life are to become applicable on the death of the legatees to the payment of other legacies will give the legatees for life priority. *Brown v. Brown*, 1 Kee. 275; see *Haynes v. Haynes*, 3 D. M. & G. 590.

Real estate subject to annuities made applicable in aid of personality.

And where real estate given, subject to certain annuities, is made applicable in aid of the personality to the payment of legacies subject to those annuities, the annuities have priority over the legacies. *Earl of Portarlington v. Damer*, 4 D. J. & S. 161; see *Coore v. Todd*, 7 D. M. & G. 520.

And, of course, when a particular legacy is given and the residue is then distributed in certain sums, the particular legacy has priority over all the others. *Gyett v. Williams*, 2 J. & H. 429; see *In re Hardy*; *Wells v. Barwick*, 17 Ch. D. 798.

4. Priority between general and residuary legatees:—

General legacies have priority over residue.

a. As a general rule the residuary legatee is entitled to nothing till all the particular legacies given by the will are satisfied in full.

Thus, a gift of the rest of a specific fund after payment of debts and funeral expenses, where legacies have been given as well, is a gift of the residue after payment of the legacies as well as the debts and funeral expenses. *Foxen v. Foxen*, 3 N. R. 452; 13 W. R. 33.

Fund set apart to pay annuities.

In the same way, where a fund is set apart to pay annuities and is directed upon the death of the annuitants respectively to fall into the residue, if the fund is insufficient to pay the annuities, the residuary legatee is entitled to nothing till all the legacies and annuities have been paid in full. *Arnold v. Arnold*, 2 M. & K. 374; *Anderson v. Anderson*, 33 B. 223; *In re Tootal's Estate*, 2 Ch. D. 623.

Direction for abatement.

b. It would seem that a direction, that in the event of insufficiency of assets all the beneficiaries are to abate, does not entitle the residuary legatee to a fund which is released by the death of a tenant for life. *In re Lyne's Estate*; *Sands v. Lyne*, 8 Eq. 482.

On the other hand, if annuities are directed to abate in favour of legatees or *vice versa*, in the event of deficient assets the abatement is permanent and a fund falling in is not applicable

to increase gifts which have abated. *Farmer v. Mills*, 4 Russ. 86; *Hichens v. Hichens*, 25 W. R. 249. Chap. XLIX.

c. Upon similar principles, where assets have been lost after the death of the testator, the loss falls on the residuary legatee in the first instance. *Wilmot v. Jenkins*, 1 B. 401; *Baker v. Farmer*, L. R. 3 Ch. 537. *Dyose v. Dyose*, 1 P. Wms. 305, is overruled; see *Fonereau v. Poyntz*, 1 B. C. C. 478; *Humphreys v. Humphreys*, 2 Cox, 186; *Baker v. Farmer*, *supra*. Loss of assets falls on the residue.

Oh the other hand, if the legatees assent to an appropriation of a particular sum in payment of their legacies, they are only entitled to the sum so appropriated and must abate if that sum proves insufficient, whether through loss of assets or otherwise. *Ex parte Chadwin*, 3 Sw. 380. Assent by legatees to appropriation.

An appropriation in satisfaction of a legacy in order to bind a legatee must be in the 3 per cents. *Prendergast v. Prendergast*, 3 H. L. 195; *Stewart v. Sanderson*, 10 Eq. 26. Appropriation.

If assets are wasted after one of several residuary legatees has received his share, then it would seem that he is not bound to refund. *Peterson v. Peterson*, 3 Eq. 111.

VI. Real estate devised, not charged with debts, including residuary real estate and specifically bequeathed personal estate rateably. *Hensman v. Fryer*, 3 Ch. D. 420 (see *Lancefield v. Iggulden*, 10 Ch. 136); *Jackson v. Pease*, 19 Eq. 96. VI. Real estate devised not charged with debts and specific gifts.

It seems to be the better opinion that real estate devised not charged with debts but descending by reason of lapse is applicable in the same order. *Blann v. Bell*, 47 L. J. Ch. 120; 7 Ch. D. 382; *Luckcraft v. Pridham*, 48 L. J. Ch. 636. *Scott v. Cumberland*, 18 Eq. 578, would probably not be followed; see *Astley v. Micklethwait*, 15 Ch. D. 59, 66; *Trethewy v. Helyar*, 4 Ch. D. 53; *Row v. Row*, 7 Eq. 414; *Hurst v. Hurst*, 28 Ch. D. 159. Lapsed realty.

In the case of land devised subject to a rent-charge or annuity, the rent-charge and the land abate rateably. *Long v. Short*, 1 P. Wms. 403; *Jackson v. Hamilton*, 9 Ir. Eq. 430; see *Raikes v. Boulton*, 29 B. 41. Devise subject to rent-charge.

VII. Property appointed by the will under a power of appointing, whether by deed or will or by will only. *Fleming v. Buchanan*, 3 D. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. VII. Property appointed.

Chap. XLIX. & G. 305; *Petre v. Petre*, 14 B. 197; *Williams v. Lomas*, 16 B. 1.

By section 4 of the Married Women's Property Act, 1882, it is enacted that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Before the Act it had been decided that property appointed by a married woman under a power of appointing by deed or will or by will only, was applicable in payment of her debts. *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572; *Mayd v. Field*, 3 Ch. D. 587; *In re Harvey's Estate*; *Godfrey v. Harden*, 13 Ch. D. 216; *Hodges v. Hodges*, 20 Ch. D. 749; see *Pike v. Fitzgibbon*, 17 Ch. D. 466; *Griffith-Boscawen v. Scott*, 26 Ch. D. 358.

VIII. Land is governed by the *lex loci*.

VIII. Land in a foreign country is governed by the *lex loci rei sitæ* and is only liable to such debts as would be cast upon it by the law of that country. *Harrison v. Harrison*, 8 Ch. 342.

#### COSTS OF ADMINISTRATION.

Costs of administration not debts.

The costs of an administration action are not debts within the meaning of a charge of debts. *Stringer v. Harper*, 26 B. 585.

The order of assets for payment of such costs is not in all respects the same as that for payments of debts.

If a particular fund is appointed they are payable out of that.

Testamentary expenses include costs of action.

It is now settled that a direction to pay testamentary expenses includes the costs of an administration action, except in so far as they have been increased by the administration of the real estate. *Morrell v. Fisher*, 4 De G. & Sm. 422; *Miles v. Harrison*, 9 Ch. 316; *Harloe v. Harloe*, 20 Eq. 471; *Penny v. Penny*, 11 Ch. D. 440; *Re Young*; *Young v. Dolman*, 44 L. T. 499; *Patching v. Barnett*, 51 L. J. Ch. 74; *In re Middleton*; *Thompson v. Harris*, 19 Ch. D. 552.

The term executorship expenses has the same meaning. *Chap. XLIX.*  
*Sharp v. Lush*, 10 Ch. D. 468.

Costs of an administration suit have been held to be included under "funeral and other expenses" and "legal expenses." *Webb v. De Beauvoisin*, 31 B. 573; *Coventry v. Coventry*, 2 Dr. & Sm. 470.

Executorship expenses.  
 Funeral and other expenses.

But the words "debts and costs of proving the will" do not include costs of a suit. *Stringer v. Harper*, 26 B. 585; see *Alsop v. Bell*, 24 B. 451.

*Browne v. Groombridge*, 4 Mad. 495, and *Gilbertson v. Gilbertson*, 34 B. 354, where the costs of a special case were held not included in testamentary expenses, and *In re Biel's Estate*, 16 Eq. 577, may be considered overruled. See, too, *Brown v. Burdett*, 53 L. J. Ch. 56.

Costs of special case.

A fund charged with payment of testamentary expenses need not be retained by the executors for more than a year if no action is apprehended. *In re Cope's Trusts*, 36 L. T. N. S. 437.

If no particular fund is appointed by the testator, costs of administration are payable out of the personal estate, except in so far as they have been increased by administration of the realty, which in that case must bear the added costs. *Ripley v. Moysey*, 1 Kee. 578; *Pickford v. Brown*, 2 K. & J. 426; *Jackson v. Pease*, 19 Eq. 96; *In re Middleton*; *Thompson v. Harris*, 19 Ch. D. 552.

Personal estate liable for costs.

The costs of administration include the costs of getting in any part of the personal estate which is in a foreign country and the payment of all duties necessary for that purpose. *Peter v. Stirling*, 10 Ch. D. 279.

What costs are included.

The costs of deciding any question of construction upon the will, though it arises only with regard to a single legacy or a settled share, are payable out of residue. *Boulton v. Beard*, 3 D. M. & G. 608.

And in the same way the costs of ascertaining the persons or classes of persons entitled to gifts general or residuary under the will are costs of administration. *In re Reeve's Trusts*, 4 Ch. D. 841.

Costs of ascertaining classes.

The costs of ascertaining the persons entitled to a lapsed Title to lapsed

**Chap. XLIX.** share of residue must be borne by that share. *Chatteris v. Young*, Beames on Costs, 390; *Skrymsner v. Northcote*, 1 Sw. 566.

**Mixed residue bears costs rateably.** Where the residue is composed of the proceeds of sale of realty directed to be converted and of personalty, given together as a mixed fund, costs of administration are payable out of the mixed fund rateably, and a lapsed share will not be applied before shares well disposed of. This is the case though the personalty may not be exonerated for the purpose of paying debts. *Luckcraft v. Pridham*, 48 L. J. Ch. 636.

**Unappointed fund not first liable.** In the case of a fund subject to a power the costs of administration will be borne rateably by appointed and unappointed shares. *Warren v. Postlethwaite*, 2 Coll. 108, 116; *Trollope v. Routledge*, 1 De G. & Sm. 662; *Moore v. Dixon*, 15 Ch. D. 566.

**Devised and lapsed estates.** It seems that devised and lapsed estates bear costs rateably. *Maddison v. Pye*, 32 B. 658; *Bagot v. Legge*, 2 Dr. & Sm. 259; see, however, *Scott v. Cumberland*, 18 Eq. 578, and cases cited ante, p. 575.

**Probate duty.** The heir cannot be made liable to pay the probate duty. *Shepherd v. Beetham*, 6 Ch. D. 597.

Costs of administration have precedence over any other costs directed to be paid out of the estate; for instance, costs of a suit in the Probate Division. *In re Mayhew*; *Rowles v. Mayhew*, 5 Ch. D. 596; *Gillooly v. Plunkett*, 9 L. R. Ir. 324.

## MARSHALLING.

### I. General rules.

**A fund applied out of its order is entitled to be recouped.**

Where a fund has been applied out of its proper order in the administration of assets, the persons who would have been entitled to the fund may claim for the amount so applied against the fund, which ought to have been applied in priority to their own. See *Tombs v. Roch*, 2 Coll. 490; *In re Mower's Trusts*, 8 Eq. 110.

**Marshalling between legatees and**

Thus, legatees may stand against descended realty or against realty charged with debts, if the personalty has been exhausted

in payment of debts. *Foster v. Cook*, 3 B. C. C. 347; *Paterson v. Scott*, 1 D. M. & G. 531; *Rickard v. Barrett*, 3 K. & J. 289. Chap. XLIX.

So, too, a general pecuniary legatee is entitled to stand against the mortgaged land in the place of a mortgagee who has exhausted the personal estate in payment of the mortgage. *Forrester v. Leigh*, Amb. 172; *Wythe v. Henniker*, 2 M. & K. 635; *Binns v. Nichols*, L. R. 2 Eq. 256. the heir or devisees charged with debts.  
Between legatees and devisees of mortgaged lands.

Pecuniary legatees are, however, not entitled to have the assets marshalled against residuary devisees, where the land is not charged with debts. *Hensman v. Fryer*, 3 Ch. 420; *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234. Between legatees and residuary devisees.

Upon similar principles it has been held that legatees are entitled to stand in the place of the vendor against an estate purchased by the testator and paid for after his death out of the general personal estate. This is clear where the estate has descended. *Sproule v. Prior*, 8 Sim. 189. Between legatees and devisees subject to a lien for the purchase money.

And it has been so held where the estate is devised. *Birds v. Askey*, 24 B. 618; *Lord Lilford v. Powys Keck*, L. R. 1 Eq. 347. *Wythe v. Henniker*, 2 M. & K. 635, is *contra*; see *Barnwell v. Iremonger*, 1 Dr. & S. 255.

So, too, the principle of marshalling applies between legatees, some of whose legacies are charged upon realty and others not. *Hanby v. Roberts*, Amb. 127; 2 Coll. 512; Dick. 104. Between legatees with and without a charge on realty.

But this is not the case if the claim against one of the funds fails; if, for instance, where the legacy is charged on land, the legatee dies before the time of payment. *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

Of course persons whose fund has been applied in its proper order have no right to stand in the place of a creditor against a fund not applicable till after their own. *Douglas v. Cooksey*, 1 R. 2 Eq. 311.

## II. Marshalling in the case of charities :

When pure and impure personalty is given to charity, the Court will not marshal the assets so as to cast the debts on the impure personalty, unless an intention can be gathered from the will that the assets are to be marshalled. *Gaskin v. Rogers*, L. R. 2 Eq. 284; *Wigg v. Nicholl*, 14 Eq. 92. Assets not marshalled in favour of charities.

In the absence of such an intention the charitable legacies

**Chap. XLIX.** will abate in the proportion of the pure to the impure personalty, the value being taken as at the time of the testator's death. *Calvert v. Armitage*, 2 N. R. 60; *Luckcraft v. Pridham*, 48 L. J. Ch. 636, 639.

**Direction that charities are to be paid out of pure personalty.** A direction that the charities are to be paid out of pure personalty will give them priority over other legatees as regards the pure personalty, but will not release the pure personalty from bearing its proportion of the debts. *Robinson v. Geldard*, 3 De G. & Sm. 499; 3 Mac. & G. 735; *Tempest v. Tempest*, 2 K. & J. 635; 7 D. M. & G. 470; *Beaumont v. Oliveira*, 6 Eq. 534; 4 Ch. 309; *Lewis v. Boctefeur*, 38 L. T. N. S. 93; see, however, *Nickisson v. Cockill*, 3 D. J. & S. 622.

**Direction that residue given to charity is to consist of pure personalty.** But a gift of residue to charity with a direction that the residue so given is to consist of pure personalty, following a provision for payment of debts out of realty and out of residuary personalty only so far as the realty will not extend, throws the debts on the impure personalty in default of realty. *Wills v. Bourne*, 16 Eq. 487.

The same is the effect of a direction to reserve the pure personalty for charities. *Miles v. Harrison*, 9 Ch. 316; see *In re Pitt's Estate*; *Lacy v. Stone*, 33 W. R. 653.

**Personalty given specifically.** A gift to a charity of such part of the testator's personal estate as he can so bequeath is specific and throws the debts on assets applicable in priority to specific legacies. *Shepherd v. Beetham*, 6 Ch. D. 597.

If the testator exonerates the pure personalty from debts it must nevertheless bear its share of the costs of administration if they are not provided for. *In re Fitzgerald*; *Adolph v. Dolman*, 26 W. R. 53.

#### CHARGE OF DEBTS.

##### I. What debts it includes :

**Charge of debts includes debts subsisting at the death.** A direction to pay debts includes all the legal debts of the testator subsisting at his death, but not debts barred by statute. *Burke v. Jones*, 2 V. & B. 275; *Maxwell v. Maxwell*, L. R. 4 H. L. 506; see *Hawkins v. Hawkins*, 13 Ch. D. 470.

**Trust to pay debts.** A trust for payment of debts will not prevent the statute from continuing to run. *Scott v. Jones*, 4 Cl. & F. 382.

Possibly, a direction to pay specific debts barred by statute Chap. XLIX would revive them. See *Clinton v. Brophy*, 10 Ir. Eq. 139; *In re Bermingham*, I. R. 4 Eq. 187; *In re Warnock's Estate*, I. R. 11 Eq. 212.

A charge of debts will include damages accrued after the testator's death on an equitable liability to indemnify and damages recovered in respect of a covenant broken after the testator's death. *Willson v. Leonard*, 3 B. 373; *Morse v. Tucker*, 5 Ha. 79. Damages accrued after the death.

And though there may be words limiting the debts to a particular class of debts, such as debts due at a particular period of the testator's life, the Court will lean to the wider construction, so as to include all the debts. *Bridgman v. Dove*, 2 Atk. 201; *Dormay v. Borradaile*, 10 B. 263; *Bermingham v. Burke*, 2 J. & Lat. 699. Debts due at a particular time.

A direction to pay the debts of another person includes the debts subsisting at his death, but not debts barred by statute. *O'Connor v. Haslam*, 5 H. L. 170; see, too, *Martin v. Smyth*, 3 L. R. Ir. 417; 5 *ib.* 266. Direction to pay debts of another.

But a direction to deduct from the share of a legatee the debts due from him to other legatees will include debts barred by statute, where the testator's intention is, that the debts in question should be treated as if they were advances made by himself. *Poole v. Poole*, 7 Ch. 17. Direction to deduct debts due from a legatee.

So where a share of residue is given to a person and a debt due from him is directed to be deducted, the whole debt and not merely what can legally be recovered is to be deducted. *Matthews v. Keble*, 4 Eq. 467; 3 Ch. 691.

II. Upon what property a charge of debts and legacies attaches:

A charge of debts and legacies on all the property of the testator charges them on specifically devised real estate. *Maskell v. Farrington*, 3 D. J. & S. 338; *Mannox v. Greener*, 14 Eq. 456; see *Earl of Portarlington v. Damer*, 4 D. J. & S. 161. Charge of debts and legacies extends to specific devisees.

A charge of debts and legacies by the will would not affect lands specifically devised by a codicil. *Quain v. Harvey*, 5 L. R. Ir. 622; *Wheeler v. Claydon*, 16 B. 169.

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Charge of legacies only is confined to residuary lands.

A general charge of legacies merely will not be extended to lands specifically devised, but will be confined to residuary lands. *Spong v. Spong*, 1 Y. & J. 300; 3 Bl. N. S. 84; 1 D. & Cl. 365; *Conron v. Conron*, 7 H. L. 168; *Campbell v. McConaghy*, 1 R. 6 Eq. 20.

It seems indifferent whether the lands specifically given are expressly subject to certain other charges or not. *Ib.*

A direction to executors to realise such part of the testator's estate as they think right to pay legacies is to be limited to property which the executors take as such and does not charge the real estate. *In re Cameron*; *Nixon v. Cameron*, 26 Ch. D. 19.

### III. How a charge of debts is created :

Devise of a rent-charge.

It seems a gift of a rent-charge without more would effect a charge on all the testator's lands. *Ex parte McDowall*, 5 Jur. N. S. 553.

Charge on realty in case the personalty should be insufficient.

A charge of debts upon realty "in case the personal estate should be insufficient for their payment" is in effect a general charge of debts, as the additional words only express what would be implied without them. *Greetham v. Colton*, 34 B. 615.

When sufficiency ascertained.

The time for ascertaining whether the personalty is sufficient is the death of the testator. If the personal estate becomes insufficient through the fault of the executors, the charge will not take effect unless the defaulting executors are also devisees of the land. *Humble v. Humble*, 2 Jur. 696; *Howard v. Chaffers*, 2 Dr. & Sm. 236; *Richardson v. Morton*, 13 Eq. 123.

#### 1. General direction to pay debts :

General direction to pay debts charges realty.

It is now clearly settled that a general direction to pay debts charges them upon real estate devised by the will. *Clifford v. Lewis*, 6 Mad. 33; *Ball v. Harris*, 8 Sim. 485; 4 M. & Cr. 264; *Shaw v. Borrer*, 1 Kee. 559; *Harding v. Grady*, 1 D. & War. 430; *Elliot v. Montgomery*, 1 R. 7 Eq. 214.

Whether realty left to descend would be charged.

Whether real estate would be charged by such a direction where the will only attempts to dispose of personalty seems doubtful. The remarks of Sir R. P. Arden, in *Shallcross v. Finden*, 3 Ves. 739, probably only contemplate a case of lapse.

Subsequent

A subsequent express charge of particular debts upon certain

estates or upon all the real estate, will not overrule the general direction. *Taylor v. Taylor*, 6 Sim. 246; *Forster v. Thompson*, 4 D. & War. 303. *Douce v. Lady Torrington*, 2 M. & K. 600, is overruled.

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express charge of certain debts on particular estates.

Nor will a subsequent express charge of all the debts upon the personalty. *Price v. North*, 1 Ph. 85; *Graves v. Graves*, 8 Sim. 43; *Hartland v. Murrell*, 27 B. 204.

Subsequent charge of all debts on personalty.

But a subsequent express charge of all the debts upon particular portions of the realty would, it seems, overrule the general direction. *Palmer v. Graves*, 1 Kee. 545. This distinction reconciles the case with those previously cited; but *quære*, whether it is substantial.

Subsequent charge of all debts upon portions of the realty.

So, too, if certain real estate is expressly excepted out of a subsequent charge of debts upon a portion of the realty, the general direction is controlled. *Thomas v. Britnell*, 2 Ves sen. 313.

Exception of certain real estate out of a subsequent charge.

Of course an express charge of debts on real and personal estate is not controlled by subsequent partial charges. *Wrigley v. Sykes*, 21 B. 337.

Express charge not controlled by partial charges.

## 2. Direction to executors to pay debts:

*a.* Again, if the executor is directed to pay the debts, they are not charged upon the real estate unless real estate is expressly devised to him. *Keeling v. Brown*, 5 Ves. 359; *Powell v. Robins*, 7 Ves. 209; *Cook v. Dawson*, 29 B. 123; 3 D. F. & J. 127.

Direction to executors to pay debts will not charge realty where no land is devised to them.

A direction to an executor to pay debts, followed by a devise to another person introduced by the word "then," will not charge the land. *Brydges v. Landen*, 3 Russ. 346, *n.*; 3 Ves. 550; *Willan v. Lancaster*, 3 Russ. 108.

But if the real estate is devised "subject as aforesaid," it is charged. *Douling v. Hudson*, 17 B. 248.

*b.* If land is devised to the executors, whether in trust or not, it is charged with debts. *Barker v. Duke of Devonshire*, 3 Mer. 310; *Henvell v. Whitaker*, 3 Russ. 343; *Dormay v. Borradaile*, 10 B. 263; *Hartland v. Murrell*, 27 B. 204; *Bentley v. Robinson*, 10 Ir. Ch. 293; *In re Tanqueray Willaume and Landau*, 20 Ch. D. 465; see *In re Bailey*, 12 Ch. D. 268.

Land devised to the executors is charged.

So legacies directed to be paid by the executor will be a Whether

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charge on land specifically devised to him. *Alcock v. Sparhawk*, 2 Vern. 228; 1 Eq. Ca. Ab. 198, pl. 4; *Preston v. Preston*, 2 Jur. N. S. 1040; *Gallimore v. Gill*, 2 Sm. & G. 158; 4 W. R. 773. The point is, however, not free from doubt: see *Parker v. Fearnley*, 2 S. & St. 592; *Cross v. Kennington*, 9 B. 150; 10 Jur. 343; 15 L. J. Ch. 167.

Where the devise is for life or in tail.

It makes no difference apparently that the devise is of an estate tail or of an estate for life. *Cloudsley v. Pelham*, 1 Vern. 411; 1 Eq. Ab. 198, pl. 2; *Harris v. Watkins*, Kay, 438; *Cook v. Dawson*, 29 B. 123; see *Finch v. Hattersley*, 3 Russ. 345, n.; *Doe d. Ashby v. Baines*, 2 C. M. & R. 23.

Devises to executors unequally.

On the other hand, if land is devised only to one of several executors or unequal interests are devised to them, the land is not charged. *Warren v. Davies*, 2 M. & K. 49; *Symons v. James*, 2 Y. & C. C. 301; *Wasse v. Helsington*, 3 M. & K. 495; *Bailey v. Bailey*, 12 Ch. D. 268.

Gift after payment of debts.

A gift of real and personal estate after payment of debts charges both. *Withers v. Kennedy*, 2 M. & K. 607; *Moore v. Whittle*, 22 L. J. Ch. 207.

Rule in *Greville v. Browne*.

3. When debts are directed to be paid, and there is a gift of the residue of the real and personal estate together, the legacies and debts are charged upon the entire residue. *Greville v. Browne*, 7 H. L. 689; *Gainsford v. Dunn*, 17 Eq. 405; *In re Bailey*, 12 Ch. D. 268, 274.

The charge extends to real estate which is enumerated in the residuary devise. *Thorman v. Hilhouse*, 7 W. R. 332; 5 Jur. N. S. 563; *Bray v. Stevens*, 12 Ch. D. 162; see *Castle v. Gillett*, 16 Eq. 530.

The rule applies whether the residuary gift follows or precedes the gift of legacies, and it extends to a legacy given by a codicil as an addition to a legacy given by the will. *Elliott v. Dearsley*, 16 Ch. D. 322; *Re Hall*; *Hall v. Hall*, 51 L. T. 86.

It is immaterial whether interests in land have been already given by the will or not. *Bench v. Biles*, 4 Mad. 187; *Francis v. Clemow*, Kay, 435; *Wheeler v. Howell*, 3 K. & J. 198.

The fact that the executors are directed to pay debts and legacies, the residuary realty and personalty being devised to

other persons, will not exclude the rule. *In re Brooke; Brooke* Chap. XLIX.  
*v. Rooke*, 3 Ch. D. 630.

The rule does not apply where the gift is not of the "residue" Gift must be of residue.  
 of the real and personal estate. *Symons v. James*, 2 Y. & C. C. 301.

Nor does it apply where the gift is of all the realty and the residue of the personalty. *Wells v. Rowe*, 48 L. J. Ch. 476; *James v. Jones*, 9 L. R. Ir. 489.

Where the whole personal estate is disposed of in certain proportions, the sums so given out of the personalty will not be Personalty given in certain shares.  
 charged on the realty by a residuary gift. *Gyett v. Williams*, 2 J. & H. 429.

A devise of land upon condition of paying a legacy charges the land with the legacy. *Wigg v. Wigg*, 1 Atk. 382.

#### 4. Charge upon income or corpus;

It would seem that a power to raise money out of the rents and profits would naturally mean out of the annual rents and profits, but the cases show that a power to raise a lump sum out of rents and profits will authorise a sale. Power to raise out of rents and profits to pay debts or legacies.  
*See Bootle v. Blundell*, 1 Mer. 233, *per Lord Eldon*; *Baines v. Dixon*, 1 Ves. sen. 42.

This is clear at any rate where the object is to pay debts or legacies. *Lingon v. Foley*, 2 Ch. Ca. 205; *Anon.* 1 Vern. 104; *Berry v. Askham*, 2 Vern. 26; *Metcalf v. Hutchinson*, 1 Ch. D. 591; *Lord Londesborough v. Somerville*, 19 B. 295.

Or, if the money is to be raised within a given time, and the annual rents would be insufficient to raise the money within that time. Money payable within a given time.  
*Sheldon v. Dormer*, 2 Vern. 310; *Warburton v. Warburton*, *ib.* 420; *Gibson v. Lord Montfort*, 1 Ves. sen. 491.

Portions, it would seem, are on the same footing as debts, as Portions.  
 it is to be presumed that they are to be paid within a limited time. *Trafford v. Ashton*, 1 P. Wms. 415; *Stanhope v. Thacker*, Prec. Ch. 435.

Similarly, if a gross sum payable out of rents and profits is payable at once, it may be raised by sale. Gross sum payable at once.  
*Allan v. Backhouse*, 2 V. & B. 65; Jac. 631.

But if the testator treats the rents and profits as applicable for some time for the purpose of raising the money, and gives the whole lands from and after raising the money, the power When the annual rents only are applicable.

**Chap. XLIX.** will be limited to the annual rents and profits. *Small v. Wing*, 5 B. P. C. 68; see *Harper v. Munday*, 7 D. M. & G. 369; *Heneage v. Lord Andover*, 3 Y. & J. 360; *Lord Lovat v. Duchess of Leeds*, 10 W. R. 398.

Where a jointure was charged upon lands devised to several devisees and the income of a portion was fluctuating, the jointure was apportioned between the devisees in proportion to the actual income received in each year. *Ley v. Ley*, 6 Eq. 174.

Fines for renewing leaseholds given in succession.

In the case of fines for renewal of leaseholds given for life with remainders, the Court will, as a rule, apportion the fine between tenant for life and remainder-man, according to their enjoyment, though it may be directed to be raised out of the "rents and profits, or by mortgage." *Greenwood v. Evans* 4 B. 44; *Jones v. Jones*, 5 Ha. 440; *Reeves v. Creswick*, 3 Y. & C. Ex. 715; *Lewin on Trusts*, p. 323; *Ainslie v. Harcourt*, 28 B 313; see *In re Marquess of Bute*; *Marquess of Bute v. Ryder*, 27 Ch. D. 196.

But if the fine is to be paid out of the "annual rents," it must be borne entirely by the tenant for life. *Solley v. Wood*, 29 B. 482.

Whether annuities are payable out of income or corpus.  
Express charge on corpus.

It is often a question of some difficulty whether an annuity is payable out of the corpus or only out of the income of a fund set aside for its payment.

a. If the annuity is plainly charged upon the corpus it is of course liable to make good arrears. *Picard v. Mitchell*, 14 B. 103; *Howarth v. Rothwell*, 30 B. 516; *Stamper v. Pickering*, 9 Sim. 176; *Wroughton v. Colquhoun*, 1 De G. & Sm. 36, 357; *Hickman v. Upsall*, 2 Giff. 124; *Gordon v. Bowden*, 6 Mad. 342; *Swallow v. Swallow*, 1 B. 432, n.; *Torre v. Browne*, 5 H. L. 555; *Haynes v. Haynes*, 3 D. M. & G. 590; *Lazonby v. Rawson*, 4 D. M. & G. 556; *Upton v. Vanner*, 1 Dr. & Sm. 594; *Horton v. Hall*, 17 Eq. 437; *Pearson v. Helliwell*, 18 Eq. 411.

Direction to set apart a fund which is to fall into the residue.

b. And if there is a clear gift of an annuity, a direction to set a fund apart to secure it which is to fall into the residue upon the death of the annuitant, does not disentitle the annuitant to have arrears made up out of corpus, since the direction is merely a means to the end. The question is then merely between

the annuitant and the residuary legatee. *Bright v. Larcher*, Chap. XLIX. 3 De G. & J. 148; *Davies v. Wattier*, 1 S. & St. 463; *May v. Bennett*, 1 Russ. 370; *Miner v. Baldwin*, 1 Sm. & G. 522; *Wright v. Callender*, 2 D. M. & G. 652; *Croly v. Weld*, 3 D. M. & G. 993; *Ingleman v. Worthington*, 1 Jur. N. S. 1062; *Mills v. Drewitt*, 20 B. 632; *Perkins v. Cooke*, 2 J. & H. 393; *Anderson v. Anderson*, 33 B. 223; *Magill v. Murphy*, 1 L. R. Ir. 196; *Carmichael v. Gee*, 5 App. C. 588; *Re Taylor*; *Ulsley v. Randall*, 50 L. T. 717.

It makes no difference that the fund if directed to fall into the residue after the death of the annuitant may go to persons other than the residuary legatees. *Wright v. Callender*, *supra*.

In these cases the direction to set apart a fund, in fact amounts to a charge upon the corpus.

c. But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus and it is a simple case of tenant for life and remainder-man. *A.-G. v. Poulden*, 3 Ha. 555; *Baker v. Baker*, 6 H. L. 616; *Hindle v. Taylor*, 20 B. 109; *Miller v. Huddleston*, 17 Sim. 71; 3 Mac. & G. 513; *Michell v. Wilton*, 23 W. R. 789.

Direction to set apart a fund to pay an annuity out of the dividends with gift over.

d. When, however, the annuity is charged upon the income of the whole estate there is more difficulty. If the capital is given over "subject to" or "after payment" of the annuities the corpus is liable. *Phillips v. Gutteridge*, 11 W. R. 12; 8 Jur. N. S. 1196; 32 L. J. Ch. 1; 4 De G. & J. 531; *Stamper v. Pickering*, 8 Sim. 176; *Playfair v. Cooper*, 17 B. 187; *Ex parte Wilkinson*, 3 De G. & S. 633; *Perkins v. Cooke*, 2 J. & H. 393; *Re Tyndall*, 7 Ir. Ch. 181; *Percy v. Percy*, 35 B. 295; *Carter v. Salt*, 1 R. 1 Eq. 97; *Bell v. Bell*, 1 R. 6 Eq. 239; *Birch v. Sherratt*, 4 Eq. 58; 2 Ch. 644; *In re Mason*; *Mason v. Robinson*, 8 Ch. D. 411; *In re Pepper's Trusts*, 13 L. R. Ir. 108.

Annuity charged upon income of whole estate.

e. But if there is anything to show that the corpus is looked upon as entire after the annuitant's death; if, for instance, it is given over immediately upon the death of the annuitant, or the trust then comes to an end, or it is then directed to be sold, or if the corpus is devised in strict settlement, it is not liable to

Corpus treated as remaining entire at the annuitant's death.

**Chap. XLIX.** make good arrears. *Foster v. Smith*, 1 Ph. 629; *Addcott v. Addcott*, 29 B. 460; *Re Kelly*, 9 Ir. Ch. 103; *Forbes v. Richardson*, 11 Ha. 354; *Tarbottom v. Earle*, 11 W. R. 680; *Darbo v. Rickards*, 14 Sim. 537; *Earle v. Bellingham* (No. 1), 24 B. 445; *Sheppard v. Sheppard*, 32 B. 194; *Taylor v. Taylor*, 17 Eq. 324.

Gift of  
surplus  
income of  
each year.

And if it is clear that the annuity is to be paid only out of the income of each year, by a gift, for instance, of the surplus income of each year as it accrues to others, the corpus is *a fortiori* not liable. *Stelfox v. Sugden*, John. 234; *Darbo v. Rickards*, 14 Sim. 537; *Sheppard v. Sheppard*, 32 B. 194; see *Wormald v. Muzeen*, 17 Ch. D. 167; *In re Matthews' Estate*, 7 L. R. Ir. 269.

When an  
annuity is a  
continuing  
charge on the  
annual rents.

*f.* In some cases the further question arises whether, supposing the annuity not to be charged upon corpus, it is a continuing charge on the rents and profits, so that arrears will have to be made up out of surplus income during the annuitant's life, and even after his death; and if there is nothing to show that the annuity was to be confined to the income of each year, as in *Stelfox v. Sugden*, or that it was to determine immediately on the annuitant's death, as in *Foster v. Smith*, 1 Ph. 629; *Earle v. Bellingham*, 24 B. 445, arrears will be a continuing charge during the annuitant's life and after his death. *Forbes v. Richardson*, 11 Ha. 354; *Phillips v. Phillips*, 8 B. 193; *Phillips v. Gutteridge*, 3 D. J. & S. 332; *Taylor v. Taylor*, 17 Eq. 324; *Booth v. Coulton*, 5 Ch. 684; *Salvin v. Weston*, 14 W. R. 757; *Wormald v. Muzeen*, 17 Ch. D. 167.

## EXONERATION OF PERSONALTY.

### I. By express words:

Exoneration  
by express  
words.

The personal estate is the primary fund for payment of debts, but it may be exonerated by express words. *Morrow v. Bush*, 1 Cox, 185; *Young v. Young*, 26 B. 522; *Dawes v. Scott*, 5 Russ. 32; *Forrest v. Prescott*, 10 Eq. 545.

Gift over of  
the fund is  
not necessary.

A direction not to pay debts out of a specific fund of personality is effectual without a gift over of the fund, though the

fund may not be specifically disposed of, but falls into the residue. *Coventry v. Coventry*, 2 Dr. & S. 470. Chap. XLIX.

When the personalty is given exonerated from debts, it is not applicable to their payment till everything else is exhausted. *Morrow v. Bush*, 1 Cox, 185; *Young v. Young*, 26 B. 522.

On the other hand, if land is given in exoneration of the personalty, the personalty is primarily liable if the land so given is insufficient. *Colville v. Middleton*, 3 B. 570.

Similarly as between land and residue, both given exempt from debts, the residue is primarily liable on failure of other funds. *Lord Brooke v. Earl of Warwick*, 1 H. & T. 142.

And personalty disposed of exempt from debts is exempted only for the purposes of that disposition and not in favour of next of kin. *Waring v. Ward*, 5 Ves. 676; *Dacre v. Patrickson*, 1 Dr. & S. 186; see *Kilford v. Blaney*, 29 Ch. D. 145. Whether personalty exonerated is exonerated in favour of next of kin.

If, however, it is exempted from debts and no disposition is made, it is exempted for all purposes. *Milnes v. Slater*, 8 Ves. 305; 1 Dr. & S. 186. See *Noel v. Noel*, 12 Pr. 214.

A conveyance of real property upon trust after the settlor's decease to pay debts will not exonerate the residuary estate passing under his will. *French v. Chichester*, 2 Vern. 568; 3 B. P. C. 16; *Trott v. Buchanan*, 28 Ch. D. 446.

But personal estate conveyed upon trust to pay debts is primarily liable. *Trott v. Buchanan*, 28 Ch. D. 446.

## II. Exoneration on the general context:

1. In the absence of express words exonerating the personalty from the payment of debts it is primarily liable, though other funds may be provided.

Thus, neither a charge of debts on the realty, or on a specific portion, nor a devise upon trust for sale for payment of debts, will exonerate the personalty. *White v. White*, 2 Vern. 43; *Walker v. Hardwick*, 1 M. & K. 396; *Ouseley v. Anstruther*, 10 B. 453; *Quennell v. Turner*, 13 B. 240; *Hancox v. Abbey*, 11 Ves. 186; *Collis v. Robins*, 1 De G. & S. 131. What will not exonerate the personalty.

2. Whether a devise upon condition of paying the testator's debts will exonerate the personalty seems doubtful. The better opinion seems to be that it will not. *Bridgman v. Dove*, 3 Atk. 201; *Meade v. Hide*, 2 Vern. 120; *Welby v. Rockcliffe*, 1 R. & M.

Chap. XLIX 571; *Henry v. Henry*, I. R. 6 Eq. 286; see *In re Kirk*; *Kirk v. Kirk*, 21 Ch. D. 431; *Corballis v. Corballis*, 9 L. R. Ir. 309.

Gift of a sum in exoneration of a mortgage directed to be paid by devisee.

But in a case not within Locke King's Act, a devise of mortgaged lands to A., he paying the mortgage, with a subsequent gift of a sum in exoneration of the mortgage, entitles the devisee to that sum and no more. *Lockhart v. Hardy*, 9 B. 379.

Express charge of certain debts on personality.

3. An express charge of certain debts upon the personality does not exonerate it from its primary liability to the other debts. *Brydges v. Phillips*, 6 Ves. 567; *Watson v. Brickwood*, 9 Ves. 447.

Gift of realty and personality together on trust to pay debts.

4. A gift of realty and personality together on trust to pay debts will not exonerate the personality from being primarily liable. *Boughton v. Boughton*, 1 H. L. 406; *Tench v. Cheese*, 6 D. M. & G. 453.

Gift on trust to sell and pay debts.

5. But if the realty is given upon trust for sale and blended with the personality upon trust to pay debts, the realty and personality are liable rateably. *Roberts v. Walker*, 1 R. & M. 752; *Stocker v. Harbin*, 3 B. 479; *Salt v. Chattaway*, 3 B. 576; *Dunk v. Fenner*, 2 R. & M. 557; *Fourdrin v. Gowdey*, 3 M. & K. 383; *Tatlock v. Jenkins*, Kay, 654; *Bedford v. Bedford*, 35 B. 584.

Discretion to trustees to sell realty.

And where real and personal estate are given together, with a discretionary power to trustees to sell as often as they should think fit, legacies directed to be paid out of the real and personal estate are payable *pro rata*. *Allan v. Gott*, 7 Ch. 439.

Realty to be sold and form part of personal estate.

So, too, if realty is directed to be converted and become part of the personal estate. *Bright v. Larcher*, 3 De G. & J. 148; *Simmons v. Rose*, 6 D. M. & G. 411.

Payments out of income of realty and personality.

6. Where the profits and income of real and personal estate are given in moieties and an annuity is directed to be paid out of one moiety, it will be payable rateably out of the profits and income of the real and personal estate. *Falkner v. Grace*, 9 Ha. 280.

Where profits and income of real and personal estate are to be accumulated during a certain time for the purpose of making certain payments and the surplus of the whole property is given together to the same persons, the income of the personality remains primarily liable. *Boughton v. Boughton*, 1 H. L. 406.

But if there is no disposition of the surplus and large payments are directed to be made out of the rents and income of the realty and personalty, so that it appears that the testator did not contemplate a surplus, and the real estate is given subject to the payments, the realty and personalty are rateably liable. *Howard v. Dryland*, 38 L. T. N. S. 24. Chap. XLIX.

An annuity charged upon land with powers of distress and entry is not payable out of personalty. *Patching v. Barnett*, 51 L. J. Ch. 74. Annuity charged on land.

7. The fact that a mixed fund of personalty and proceeds of sale of realty is created, which is charged with debts and legacies under the rule in *Greville v. Brown* or by a general direction to pay debts, will not exonerate the personalty from its primary liability, in the absence of a direction to pay the debts and legacies out of the mixed fund. *Luckcraft v. Pridham*, 48 L. J. Ch. 636; *Wells v. Row*, 48 L. J. Ch. 476; *Elliott v. Dearsley*, 16 Ch. D. 322. Charge on mixed fund does not exonerate personalty.

8. A charge of debts, funeral and testamentary expenses on the realty, which latter it can hardly be supposed the personalty would be insufficient to meet, will nevertheless not exonerate the personalty. *Walker v. Jackson*, 2 Atk. 624; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; see *Coote v. Coote*, 3 J. & Lat. 175. Charge of funeral and testamentary expenses on realty.

But where the whole personal estate is given not as a residue but specifically and the realty is subject to all the charges to which the personalty would be liable, the personalty is exonerated; if, for instance, all the personalty is given and the realty is charged with debts, funeral expenses and costs of administration. *Greene v. Greene*, 4 Mad. 148; *Michell v. Michell*, 5 Mad. 69; *Blount v. Hipkins*, 7 Sim. 43; *Gilbertson v. Gilbertson*, 34 B. 354. Personal estate specifically given.

The same rule applies with regard to legacies where the whole personalty is given and legacies are charged upon land. *Jones v. Bruce*, 11 Sim. 221; *Lance v. Aglionby*, 27 B. 65. Legacies charged on land where the personalty is specifically given.

And where the personalty was specifically given and a particular estate was devised upon trust to pay debts, funeral and testamentary expenses, upon failure of that estate the general personalty and the realty were held liable *pro rata* to make up

Chap. XLIX. the deficiency. *Powell v. Riley*, 12 Eq. 175; this case was, however, disapproved by Jessel, M. R. See *In re Ovey*; *Broadbent v. Barrow*, 51 L. J. Ch. 665, 667.

**Specific gift of personalty to an executor.** The fact, however, that the gift of all the personalty is to a person appointed executor is a strong argument against the exoneration of the personalty. *Brummel v. Prothero*, 3 Ves. 111; *Aldridge v. Lord Wallscourt*, 1 Ba. & Be. 312.

And when it is doubtful whether the whole personal estate is meant to be given specifically or only as a residue, the fact that funeral and testamentary expenses are not charged on the realty, as well as the debts, is an argument against exoneration. *Collis v. Robins*, 1 De G. & S. 131; *Ouseley v. Anstruther*, 10 B. 453; *Boote v. Blundell*, 1 Mer. 193; 19 Ves. 494; see *Tower v. Lord Rous*, 18 Ves. 138.

**Effect of charge of particular debts on realty.**

9. There is no rule to the effect that a charge of particular debts upon realty makes the realty the primary fund for those debts. *Quennell v. Turner*, 13 B. 240; *Noel v. Lord Henley*, 7 Pr. 241; Dan. 211; see *Bickham v. Cruttwell*, 3 M. & Cr. 763.

*Hancox v. Abbey and Evans v. Cockeram.*

The cases of *Hancox v. Abbey*, 11 Ves. 179, and *Evans v. Cockeram*, 1 Coll. 428, only establish, that where a debt is already a charge upon realty, a devise of lands including the mortgaged land in trust for sale and payment of the mortgaged debt, or a declaration that the mortgage is to be charged upon the land, must mean that it is to be a primary charge on the land, otherwise, as it is already a charge upon realty, the words would have no meaning.

*Hancox v. Abbey*, however, probably comes better under another head, see pp. 589, 593.

*Welby v. Rockcliffe*, 1 R. & M. 571, was decided on the ground that the testator had imposed the condition of paying his debts upon the devisee; and in *Clutterbuck v. Clutterbuck*, 1 M. & K. 15, there was a gift of the residue of the real and personal estate not therein-before otherwise disposed of, showing that the only land given was after payment of the sum directed to be raised to pay debts.

**Distinction between cases of exoneration and specific**

The cases where legacies given out of a particular fund have been held payable out of that fund are also distinguishable. The question in those cases has generally been, not whether the

personalty was only secondarily liable, but whether it was liable Chap. XLIX.  
 at all; in other words, whether the legacy was demonstrative <sup>gifts of</sup>  
 or specific. See, for instance, *Dicken v. Edwards*, 4 Ha. 273; <sup>interests in</sup>  
*Bessant v. Noble*, 26 L. J. Ch. 236; *Fream v. Dowling*, 20 B.  
 624; 4 Eq. 145, n.

10. Where, however, a sum is directed to be raised out of <sup>Gift of lands</sup>  
 land for payment of debts and the land is not given till after <sup>after payment</sup>  
 such payment or only the residue of the land is given, there <sup>of debts.</sup>  
 is a strong argument that the land was to be the primary  
 fund. *Hancox v. Abbey*, 11 Ves. 179; *Hale v. Cox*, 3 B. C. C.  
 322; see *Clutterbuck v. Clutterbuck*, 1 M. & K. 15; *Noel v.*  
*Noel*, 12 Pr. 214; Lord St. Leonards' Law of Property, 363, 365;  
*Ion v. Ashton*, 28 B. 379; *In re Needham*; *Robinson v.*  
*Needham*, 54 L. J. Ch. 75.

#### TENANT FOR LIFE AND REMAINDERMAN.

##### I. Capital and income.

1. As between tenant for life and remainderman, dividends  
 declared before the death of the tenant for life, though not paid  
 till afterwards, belong to his representatives. *Wright v. Tuckett*,  
 1 J. & H. 266.

Dividends on shares in a company declared after the death of <sup>Dividends on</sup>  
 the tenant for life, though earned before his death go to the <sup>shares.</sup>  
 remainderman. *Mackinley v. Bates*, 31 B. 280.

On the other hand partnership profits declared for a past <sup>Partnership</sup>  
 period are the income of that period. *Ibbotson v. Elam*, L. R. <sup>profits.</sup>  
 1 Eq. 188; *Browne v. Collins*, 12 Eq. 586.

Debts are the profits of the period when they are got in. <sup>Debts.</sup>  
*Maclaren v. Stainton*, 3 D. F. & J. 202; *Edmondson v. Cros-*  
*thwaite*, 34 B. 30.

A fund created for the protection of property given for life is  
 capital. *Varlo v. Faden*, 1 D. F. & J. 211.

As between successive tenants for life of a business, it has  
 been held that losses incurred during the life of one tenant for life  
 must be made good out of profits earned during the life of the  
 next tenant for life, and not out of capital. *Upton v. Brown*,  
 26 Ch. D. 588; see too, *Gow v. Forster*, 26 Ch. D. 672; *Re*  
*Millechamp*, 52 L. T. 758.

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Power of declaring whether profits are to be capital or income.

2. When there is a power vested in a duly constituted authority of declaring whether profits shall be added to capital or distributed, the tenant for life is bound by the authority. *Straker v. Wilson*, 6 Ch. 503; *In re Ezekiel Barton's Trust*, 5 Eq. 238; *Baring v. Ashburton*, 16 W. R. 452; see *In re Cox's Trusts*, 9 Ch. D. 159.

Bonuses out of capital.

3. With regard to bonuses, it seems clear that bonuses declared out of capital are capital. *Paris v. Paris*, 10 Ves. 185; *Watts v. Steere*, 13 Ves. 363; *Brander v. Brander*, 14 Ves. 80.

Bonuses out of profits.

On the other hand, bonuses declared out of profits, whether accumulated profits or not, are income. *Barclay v. Wainwright*, 14 Ves. 66; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 Sim. 163; *Plumbe v. Neild*, 8 W. R. 337; 29 L. J. Ch. 618; *Dale v. Hayes*, 19 W. R. 299; *In re Hopkins' Trust*, 18 Eq. 696; see *Hollis v. Allan*, 14 W. R. 980.

This is the case although the profits were entirely earned before the testator's death. *Re Bouch*; *Sproule v. Bouch*, 29 Ch. D. 635.

Waste.

4. A tenant for life cannot commit waste unless expressly made unimpeachable for waste.

Without impeachment of waste.

A tenant for life without impeachment of waste, voluntary waste excepted, is in effect only excused for permissive waste. *Garth v. Cotton*, 1 Ves. 524, 546; 1 Dick. 183.

But the exception of voluntary waste may be qualified so as in effect to entitle the tenant for life to cut timber. *Vincent v. Spicer*, 22 B. 380; see *Wickham v. Wickham*, 19 Ves. 419.

Tenant in fee with executory devise over.

A tenant in fee subject to an executory devise over may commit legal but not equitable waste. *Turner v. Wright*, Jo. 742; 2 D. F. & J. 234.

And he may be restrained from cutting timber by express words. *Blake v. Peters*, 1 D. J. & S. 345.

Timber for repairs.

a. Tenant for life impeachable for waste may cut timber for repairs actually about to be done, but he may not sell the timber in order to spend the money in repairs. *Gower v. Eyre*, G. Coop. 156; *Simmons v. Norton*, 7 Bing. 640.

He may, however, sell the timber cut in order to buy timber in a more convenient situation. *Sowerby v. Fryer*, 8 Eq. 417.

b. In the case of a timber estate the tenant for life is entitled to the proceeds of the periodical cuttings. *Bateman v. Hotchkin*, 31 B. 486; *Bagot v. Bagot*, 32 B. 509, 517. Char. XLIX.  
Periodical cuttings.

c. And even where the estate is not a timber estate the tenant for life is entitled to the rightful cuttings of all trees which are not timber or ornamental or useful to the estate. *Pidgely v. Rawling*, 2 Coll. 275; *Earl Cowley v. Wellesley*, 35 B. 638; S. C., L. R. 1 Eq. 656; see 18 Eq. 307; *Honywood v. Honwood*, 18 Eq. 306. Timber cuttings.

d. When timber trees are cut down by order of the Court to improve other trees or because they are decaying, the tenant for life is entitled to the income of the proceeds. *Tooker v. Annesley*, 5 Sim. 235; *Tollemache v. Tollemache*, 1 Ha. 456; *Ferrand v. Wilson*, 4 Ha. 381; *Earl Cowley v. Wellesley*, L. R. 1 Eq. 657; *Honywood v. Honwood*, 18 Eq. 306. Timber cut by the Court.

The capital will belong to the first owner of an estate of inheritance or to the first tenant for life unimpeachable for waste who comes into possession. *Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 263; *Jodrell v. Jodrell*, 7 Eq. 461; *Lowndes v. Norton*, 6 Ch. D. 139.

Tenant for life unimpeachable cutting down ornamental timber which the Court would have directed to be cut if application had been made to it is entitled to the proceeds. *Baker v. Sebright*, 13 Ch. D. 179.

As to the rights of a tenant for life and remainderman in the case of plantations injured by gales. See *In re Ainslie*; *Swinburn v. Ainslie*, 28 Ch. D. 89; rev. 33 W. R. 910; *In re Harrison's Trusts*; *Harrison v. Harrison*, 28 Ch. D. 220.

A tenant for life is not entitled to the produce of mines opened after the testator's death. *Campbell v. Wardlaw*, 8 App. C. 641.

A tenant for life is not liable for permissive waste. *Powys v. Blaglove*, 4 D. M. & G. 448; *Warren v. Rudall*, 1 J. & H. 1; *Burnes v. Dowling*, 44 L. T. 809. Permissive waste.

But if the will directs the tenant for life to repair, his estate is liable if proceedings are taken within six months after his executor has taken upon himself the administration of the tenant for life's estate. *Woodhouse v. Walker*, 5 Q. B. D. 404; *Re Williams*; *Andrew v. Williams*, 52 L. T. 41.

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## II. Residue given to persons in succession.

What is  
residue as  
between  
tenant for  
life and re-  
mainderman.

As between tenant for life and remainderman, residue is what remains after taking such portion of the capital as, together with the income of such portion for one year, whatever that income may be, is required to pay the testator's debts and legacies. *Allhusen v. Whittell*, 4 Eq. 294; *Lambert v. Lambert*, 16 Eq. 320; *Marshall v. Crowther*, 2 Ch. D. 199.

Property  
properly  
invested.

1. The tenant for life is entitled from the testator's death to the income of so much of the property as is invested on authorized securities. *Brown v. Gellatly*, L. R. 2 Ch. 751.

Unauthorized  
securities.

2. With regard to unauthorized securities, the tenant for life is entitled from the testator's death to the income which would be produced by the money upon unauthorized security, if invested on authorized security at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Ha. 161; *Brown v. Gellatly*, L. R. 2 Ch. 751.

No allowance can be made to the tenant for life for the fact that securities are sold at a higher or lower rate between two dividends. *Scholefield v. Redfern*, 2 Dr. & Sm. 173; *Freman v. Whitbread*, 1 Eq. 266.

And the tenant for life cannot be required to make an allowance where stocks are bought at a time when several months' dividend has accrued on them. *In re Clarke*; *Barker v. Perowne*, 18 Ch. D. 160.

Property  
which cannot  
be converted.

3. With regard to property which cannot be converted within the year or which is retained for the convenience of the estate, the tenant for life is entitled from the testator's death to interest at 4 per cent. upon the then value of such property. *Meyer v. Simonsen*, 5 De G. & S. 723; *Brown v. Gellatly*, L. R. 2 Ch. 751; *Furley v. Hyder*, 42 L. J. Ch. 626; see *Arnold v. Enis*, 2 Ir. Ch. 601.

Where a fund is without authority employed in a business in which large profits are earned, the tenant for life is entitled to interest at 4 per cent. on the fund and on the profits beyond 4 per cent., which must be treated as capital. *In re Hill*; *Hill v. Hill*, 50 L. J. Ch. 551.

4. In *Gibson v. Bott*, 7 Ves. 89, the tenant for life was allowed interest from the death on the value at the death of leaseholds

which could not be sold on account of a flaw in the title. See Chap. XLIX. note, 1 Y. & C. C. 320.

5. Where personalty is directed to be laid out in land the tenant for life is entitled to the income from the testator's death. *Macpherson v. Macpherson*, 1 Macq. 243. Personalty to be laid out in land.

Where accumulation is directed till investment, one year is allowed. *Sitwell v. Barnard*, 6 Ves. 520.

6. Reversionary property must be sold under trusts for conversion and if the testator gives his trustees a discretion as to the period of conversion, interest will be allowed upon the value of the reversion at the end of a year from the death. *Wilkinson v. Duncan*, 23 B. 469; *Johnson v. Routh*, 3 Jur. N. S. 1041; 27 L. J. Ch. 305; *Countess of Harrington v. Atherton*, 3 D. J. & S. 352. Reversionary property must be sold.

If the reversion falls in before it is sold the tenant for life is entitled to interest at 4 per cent. from the death upon the value of the reversion at the end of a year from the death, on the assumption that it was to fall in when it actually did fall in. *Wilkinson v. Duncan*, 23 B. 469; *Wright v. Lambert*, 6 Ch. D. 649.

7. The tenant for life is entitled to the income of a fund set apart to pay contingent legacies. *Crawley v. Crawley*, 7 Sim. 427; *Fullerton v. Martin*, 1 Dr. & Sm. 31; *Cranley v. Dixon*, 23 B. 513; *Allhusen v. Whittell*, 4 Eq. 295. Income of fund to pay contingent legacies goes to tenant for life.

8. With regard to assets recovered after the testator's death, the tenant for life is entitled to the difference between the sum recovered and the sum which, if invested at 4 per cent. at the testator's death, would have amounted to the sum recovered. *Cox v. Cox*, 8 Eq. 343; *Ackroyd v. Ackroyd*, 18 Eq. 313; *In re Tinkler's Estate*, 20 Eq. 456; see *Maclaren v. Stainton*, 4 Eq. 448; 11 Eq. 382. Apportionment of recovered assets.

It appears to be unsettled whether the amount is to be calculated with yearly rests or not. *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *In re Moore*; *Moore v. Johnson*, 54 L. J. Ch. 432.

9. When the tenant for life is entitled to the specific enjoyment of leaseholds which are converted under compulsory powers, he will be entitled to the same income as before and if Leaseholds converted under compulsory powers.

Chap. XLIX he survives the period when the lease would have determined, he is absolutely entitled to the purchase-money. *Jeffreys v. Conner*, 28 B. 328; *In re Beaufoy's Estate*, 1 Sm. & G. 20; *In re Money's Trusts*, 2 Dr. & S. 94; see *Phillips v. Sargent*, 7 Ha. 33.

Title to fund  
for renewal  
where renewal  
has become  
impossible.

10. In the case of renewable leaseholds where the testator has directed the creation of a fund for renewal out of the rents and the power of renewal is subsequently destroyed, the remainderman will be entitled to the fund for renewal if the object of the testator was to keep the leaseholds perpetually renewed at any cost. *In re Wood's Estate*, 10 Eq. 572; *Hollier v. Burne*, 16 Eq. 163; *Muddy v. Hale*, 3 Ch. D. 327; see *In re Lord Ranelagh's Will*, 26 Ch. D. 591.

The fund must be invested in ordinary securities, and the tenant for life will get the dividends. *In re Barber's Settled Estates*, 18 Ch. D. 624.

If renewal has become impossible through the act of the testator, the trust is at an end. *Penfold v. Shillingford*, 46 L. J. Ch. 491.

11. On the other hand, if only a reasonable sum is to be applied in renewals, the tenant for life will be entitled to the whole fund. *Morris v. Hodges*, 27 B. 625; *In re Money's Trusts*, 2 Dr. & S. 94; 10 W. R. 399; see *Hayward v. Pile*, 5 Ch. 215.

Apportion-  
ment of costs  
of renewal.

12. When renewable leaseholds are given to several persons in succession without any direction as to how the cost of renewal is to be borne, the rules are :—

a. If the tenant for life gets no advantage from the renewal, the sum to be paid by the remainderman is the sum actually paid with compound interest at 4 per cent. down to the death of the tenant for life and simple interest afterwards. *Nightingale v. Lawson*, 1 B. C. C. 440; *White v. White*, 9 Ves. 557; *Giddings v. Giddings*, 3 Russ. 260.

b. If the tenant for life lives to enjoy the benefit of the renewal, the remainderman has to pay a sum bearing the same proportion to the whole sum paid as the benefit he gets from the renewal bears to the whole of the renewed lease with interest as before; cases *supra*.

c. In the case of renewable leaseholds for lives the same principles apply, the value of the lives being calculated at the time of the renewal according to the tables framed for the purpose; the chance that the new life may fail during the subsistence of the other *cestuis que vie* being apparently thrown upon the remainderman. *Jones v. Jones*, 5 Ha. 440; *Harris v. Harris*, 32 B. 333; *Bradford v. Brownjohn*, 3 Ch. 711. Chap. XLIX.

13. A purchase of the reversion by the tenant for life of renewable leaseholds enures for the benefit of the remainderman. *Phillips v. Phillips*, 29 Ch. D. 673. Purchase of reversion.

Where the tenant for life buys the reversion of leaseholds devised in strict settlement, there being no trust to renew, he is entitled to a charge for the purchase money.

If the fee is conveyed on the trusts of the will the first tenant in tail who would have been absolutely entitled to the leaseholds is entitled to an interest equivalent to the residue of the term which would have been left at the death of the tenant for life.

If the fee is conveyed to the tenant for life, the first tenant in tail is absolutely entitled. *Isaac v. Wall*, 6 Ch. D. 706.

14. The tenant for life must bear the valuation payable to an outgoing tenant, and he has no claim for the amount against the estate. *Mansel v. Norton*, 22 Ch. D. 769; see, too, *In re Crawley*; *Acton v. Crawley*, 28 Ch. D. 431. Valuation to outgoing tenant

15. He must also bear the cost of drainage work required to be done by the vestry. *In re Crawley*; *Acton v. Crawley*, 28 Ch. D. 431. Drainage work.

16. Where the will contains no trust to insure and a policy is effected by a partial owner the policy moneys belong to him. *Warwicker v. Bretnall*, 23 Ch. D. 188. Insurance.

17. As a general rule a tenant for life of chattels is bound to sign an inventory, but not to give any security. *Foley v. Burnell*, 1 B. C. C. 279; *Conduitt v. Soane*, 1 Coll. 285. Inventory of chattels.

## CHAPTER L.

### SUGGESTIONS FOR PREPARING WILLS.

#### Chap. L.

THE possible dispositions of property by testators are so infinitely various that general suggestions can be of very little use. The following points have however been selected as likely to be of frequent occurrence:—

1. With regard to payment of debts, if land is to be applied in exoneration of the personalty an express direction to that effect should be inserted.

2. The testator should consider whether mortgages are to be borne by the devisee or to be discharged out of the general personal estate. In the latter case a declaration to that effect should be inserted.

3. In the case of bequests to charities not empowered to take land by devise, proper directions as to payment out of pure personalty should be inserted.

4. In the description of the subject-matter of the testator's bounty language generally intelligible should be used. Thus, terms of art, symbols, terms derived from local custom and so on should be avoided.

5. Things should be described by their permanent and not by their changeable characteristics; for instance, description of land by occupation should be avoided.

6. In the case of specific bequests care should be taken to ascertain the exact title of the stock or other security which is the subject of the bequest and the testator should be reminded of the liability of specific gifts to ademption by change of security or sale.

7. Inquiry should be made whether annuities given by the will are intended to be for the lives of the annuitants only or perpetual.

8. Residuary gifts should be expressed in the most general terms and enumeration of particular things should be avoided.

9. When a residue is given to several persons in succession, the testator should consider whether the tenant for life is intended to enjoy the property in the state in which it may be found at the testator's death or whether it is to be converted.

10. In the description of persons the same general caution applies as in the description of things.

11. If the gift is to a husband and wife with others, care should be taken to secure that the wife should take a separate share.

12. In the case of gifts to several persons or to classes words of severance should be introduced unless a joint tenancy is intended.

13. If illegitimate children are to be provided for, the fact that illegitimate children are intended should be unmistakeably expressed.

14. In the case of bequests to children, where it is possible that children may be born after the period of distribution has arrived, the testator should consider whether he wishes all the children to be included, and, in the latter event, clear words to that effect should be introduced.

15. In the case of gifts to several classes of persons or to different generations of issue, if the distribution is intended to be *per stirpes* there should be words to that effect.

16. It will as a rule be found advisable to avoid such vague terms as relations or family.

17. In gifts of personalty, words whether of purchase or limitation appropriate to realty should be avoided, and the same applies *mutatis mutandis* to devises.

18. In the case of gifts to a parent and children, or to a parent and issue, care should be taken to show whether the children or issue were intended to take concurrently with their parent or not.

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19. The difficulties arising upon the rule in *Shelley's case* are too familiar to need comment.

20. The testator should be careful to distinguish between a recommendation and an obligation intended to be imposed on a legatee and in cases where he merely desires to express a wish there should be an express declaration that no trust is intended.

21. Clear directions should be inserted with regard to vesting in cases where bequests are intended to be contingent upon the attainment of a given age and care should be taken to bring clearly before the testator's mind the distinction between payment and vesting.

22. In the case of conditions imposed upon legatees there should be a gift over in the event of a clear and definite breach and care must be taken that the breach should accurately correspond with the condition. Testators should, however, be warned that to impose any but the simplest conditions upon legatees is as a rule an invitation to litigation.

23. Care should be taken that the dispositions of the testator do not infringe the rule against perpetuity and that there is no trust for accumulation beyond the limits allowed by statute.

24. In substitutional gifts to children inquiry should be made whether any persons satisfying the description of the members of the original class are dead at the date of the will leaving children and provision should be made accordingly.

25. In survivorship clauses, it should be clearly indicated to what period survivorship is to be referred, and whether survivorship is contemplated between individuals or between *stirpes*.

# APPENDIX.

## 1 VIC. CAP. XXVI.

### AN ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS. [3RD JULY, 1837.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the Words and Expressions hereinafter mentioned, which in their ordinary Signification have a more confined or a different Meaning, shall in this Act, except where the Nature of the Provision or the Context of the Act shall exclude such Construction, be interpreted as follows: (that is to say,) the Word "Will" shall extend to a Testament, and to a Codicil, and to an Appointment by Will or by Writing in the Nature of a Will in exercise of a Power, and also to a Disposition by Will and Testament or Devise of the Custody and Tuition of any Child, by virtue of an Act passed in the Twelfth Year of the Reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for Settling a Revenue upon His Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of Ireland in the Fourteenth and Fifteenth Years of the Reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service*, and to any other Testamentary Disposition; and the words "Real Estate" shall extend to Manors, Advowsons, Messuages, Lands, Tithes, Rents, and Hereditaments, whether Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether corporeal, incorporeal, or personal, and to any undivided Share thereof, and to any Estate, Right, or Interest (other than a Chattel Interest) therein; and the Words "Personal Estate" shall extend to Leasehold Estates and other Chattels Real, and also to Monies, Shares of Government and other Funds, Securities for Money (not being Real Estates), Debts, Choses in Action, Rights, Credits, Goods, and all other Property whatsoever which by Law devolves upon the Executor or Administrator, and to any Share or Interest therein; and every Number: Word importing the Singular Number only shall extend and be applied to several Persons or Things as well as One Person or Thing; and every Word importing the Masculine Gender only shall extend Gender. and be applied to a Female as well as a Male.

Appendix.

Meaning of  
certain words  
in this Act:

"Will:"

12 Car. 2,  
c. 24.

14 & 15 Car.  
2 (I.)

"Real  
Estate:"

"Personal  
Estate:"

**Appendix.**

- Repeal of the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.  
10 Car. 1, Sess. 2, c. 2 (I.).  
Secs. 5, 6, 12, 19, 20, 21, and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 Will 3, c. 12 (I.).  
Sec. 14 of 4 & 5 Anne, c. 16.  
6 Anne, c. 10 (I.).  
Sec. 9 of 14 Geo. 2, c. 20.  
25 Geo. 2, c. 6 (except as to Colonies).  
25 Geo. 2, c. 11 (I.).  
55 Geo. 3, c. 192.
- II. And be it further enacted, That an Act passed in the Thirty-second Year of the Reign of King *Henry* the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land*; and also an Act passed in the Thirty-fourth and Thirty-fifth Years of the Reign of the said King *Henry* the Eighth, intituled *The Bill concerning the Explanation of Wills*; and also an Act passed in the Parliament of *Ireland*, in the Tenth Year of the Reign of King *Charles* the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins*; and also so much of an Act passed in the Twenty-ninth Year of the Reign of King *Charles* the Second, intituled *An Act for the Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of *Ireland* in the Seventh Year of the Reign of King *William* the Third, intituled *An Act for the Prevention of Frauds and Perjuries*, as relates to Devises or Bequests of Lands or Tenements, or to the Revocation or Alteration of any Devise in Writing of any Lands, Tenements, or Hereditaments, or any Clause thereof, or to the Devise of any Estate *pur autre vie*, or to any such Estate being Assets, or to Nuncupative Wills, or to the repeal, altering, or changing of any Will in Writing concerning any Goods or Chattels or Personal Estate, or any Clause, Devise, or Bequest therein; and also so much of an Act passed in the Fourth and Fifth Years of the Reign of Queen *Anne*, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of *Ireland* in the Sixth Year of the Reign of Queen *Anne*, intituled *An Act for the Amendment of the Law and the better Advancement of Justice* as relates to Witnesses to Nuncupative Wills; and also so much of an Act passed in the Fourteenth Year of the Reign of King *George* the Second, intituled *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the Twenty-ninth Year of the Reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries'*, as relates to Estates *pur autre vie*; and also an Act passed in the Twenty-fifth Year of the Reign of King *George* the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America*, except so far as relates to His Majesty's Colonies and Plantations in *America*; and also an Act passed in the Parliament of *Ireland* in the same Twenty-fifth Year of the Reign of King *George* the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates*; and also an Act passed in the Fifty-fifth Year of the Reign of King *George* the Third, intituled *An Act to remove certain difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any Wills or Estates *pur autre vie* to which this Act does not extend.
- III. And be it further enacted, That it shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all Real Estate and all Personal Estate
- All property may be disposed of by

which he shall be entitled to, either at Law or in Equity, at the Time of his Death, and which, if not so devised, bequeathed, or disposed of would devolve upon the Heir at Law, or Customary Heir of him, or, if he became entitled by Descent, of his Ancestor, or upon his Executor or Administrator; and that the power hereby given shall extend to all Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, notwithstanding that the Testator may not have surrendered the same to the Use of his Will, or notwithstanding that, being entitled as Heir, Devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a Custom to devise or surrender to the Use of a Will or otherwise, could not at Law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a Custom that a Will or a Surrender to the Use of a Will should continue in force for a limited Time only, or any other special Custom, could not have been disposed of by Will according to the Power contained in this Act, if this Act had not been made: and also to Estates *pur autre vie*, whether there shall or shall not be any special Occupant thereof, and whether the same shall be Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether the same shall be a corporeal or an incorporeal Hereditament; and also to all contingent, executory, or other future Interests in any Real or Personal Estate, whether the Testator may or may not be ascertained as the Person or one of the Persons in whom the same respectively may become vested, and whether he may be entitled thereto under the Instrument by which the same respectively were created or under any Disposition thereof by Deed or Will; and also to all Rights of Entry for Conditions broken, and other Rights of Entry; and also to such of the same Estates, Interests, and Rights respectively, and other Real and Personal Estate, as the Testator may be entitled to at the time of his Death, notwithstanding that he may become entitled to the same subsequently to the Execution of his Will.

## Appendix.

Will, comprising Customary Freeholds and Copyholds without Surrender, and before Admittance, and also such of them as cannot now be devised;

Estates *pur autre vie*;

contingent Interests;

Rights of Entry; and Property acquired after Execution of the Will.

IV. Provided always, and be it further enacted, That where any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, might, by the Custom of the Manor of which the same is holden, have been surrendered to the Use of a Will, and the Testator shall not have surrendered the same to the Use of his Will, no person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon payment of all such Stamp Duties, Fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such Real Estate to the Use of the Will, or in respect of presenting, registering, or enrolling such Surrender, if the same Real Estate had been surrendered to the Use of the Will of such Testator: Provided also that where the Testator was entitled to have been admitted to such Real Estate, and might, if he had been admitted thereto, have surrendered the same to the Use of his Will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such Real Estate in consequence of such Will shall be entitled to be admitted to the same Real Estate by virtue thereof, except on Payment of all such Stamp Duties, Fees, Fines, and Sums of Money as would have been

As to the Fees and Fines payable by Devisees of Customary and Copyhold Estates.

**Appendix.**

lawfully due and payable in respect of the Admittance of such Testator to such Real Estate, and also of all such Stamp Duties, Fees, and Sums of Money as would have been lawfully due and payable in respect of surrendering such Real Estate to the Use of the Will, or of presenting, registering, or enrolling such Surrender, had the Testator been duly admitted to such Real Estate, and afterwards surrendered the same to the Use of his Will; all which Stamp Duties, Fees, Fine, or Sums of Money due as aforesaid shall be paid in addition to the Stamp Duties, Fees, Fine, or Sums of Money due or payable on the Admittance of such Person so entitled or claiming to be entitled to the same Real Estate as aforesaid.

Wills or Ex-  
tracts of Wills  
of Customary  
Freeholds and  
Copyholds to  
be entered on  
the Court  
Rolls;

and the Lord  
to be entitled  
to the same  
Fine, &c.,  
when such  
Estates are  
not now de-  
visable, as he  
would have  
been from the  
Heir in case  
of Descent.  
Estates *pur  
autre vie*.

V. And be it further enacted, That when any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, shall be disposed of by Will, the Lord of the Manor or reputed Manor of which such Real Estate is holden, or his Steward, or the Deputy of such Steward, shall cause the Will by which such Disposition shall be made, or so much thereof as shall contain the Disposition of such Real Estate, to be entered on the Court Rolls of such Manor or reputed Manor; and when any Trusts are declared by the Will of such Real Estate, it shall not be necessary to enter the Declaration of such Trusts, but it shall be sufficient to state in the Entry on the Court Rolls that such Real Estate is subject to the Trusts declared by such Will; and when any such Real Estate could not have disposed of by Will if this Act had not been made, the same Fine, Heriot, Dues, Duties, and Services shall be paid and rendered by the Devisee as would have been due from the Customary Heir in case of the Descent of the same Real Estate, and the Lord shall as against the Devisee of such Estate have the same Remedy for recovering and enforcing such Fine, Heriot, Dues, Duties, and Services as he is now entitled to for recovering and enforcing the same from or against the Customary Heir in case of a Descent.

VI. And be it further enacted, That if no Disposition by Will shall be made of any Estate *pur autre vie* of a Freehold Nature, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of special Occupancy, as Assets by Descent, as in the Case of Freehold Land in Fee Simple; and in case there shall be no special Occupant of any Estate *pur autre vie*, whether Freehold or Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether a corporeal or incorporeal Hereditament, it shall go to the Executor or Administrator of the Party that had the Estate thereof by virtue of the Grant; and if the same shall come to the Executor or Administrator either by reason of a special Occupancy or by virtue of this Act, it shall be assets in his Hands, and shall go and be applied and distributed in the same Manner as the Personal Estate of the Testator or Intestate.

No Will of a  
Person under  
Age valid;  
nor of a Feme  
Covert, except  
such as might  
now be made.  
Every Will

VII. And be it further enacted, That no Will made by any Person under the Age of Twenty-one Years shall be valid.

VIII. Provided also, and be it further enacted, That no Will made by any Married Woman shall be valid, except such a Will as might have been made by a Married Woman before the passing of this Act.

IX. And be it further enacted, That no Will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned;

(that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

X. And be it further enacted, That no Appointment made by Will, in exercise of any Power, shall be valid, unless the same be executed in manner herein-before required; and every Will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a Power of Appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such Power should be executed with some additional or other Form of Execution or Solemnity.

XI. Provided always, and be it further enacted, That any Soldier being in actual Military Service, or any Mariner or Seaman being at Sea, may dispose of his Personal Estate as he might have done before the making of this Act.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the Provisions contained in an Act passed in the Eleventh Year of the Reign of His Majesty King *George* the Fourth and the First Year of the Reign of His late Majesty King *William* the Fourth, intituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy*, respecting the Wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines, so far as relates to their Wages, Pay, Prize Money, Bounty Money, and Allowances, or other Monies payable in respect of services in Her Majesty's Navy.

XIII. And be it further enacted, That every Will executed in manner herein-before required shall be valid without any other Publication thereof.

XIV. And be it further enacted, That if any person who shall attest the Execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a Witness to prove the Execution thereof, such Will shall not on that Account be invalid.

XV. And be it further enacted, That if any Person shall attest the Execution of any Will to whom or to whose Wife or Husband any beneficial Devise, Legacy, Estate, Interest, Gift, or Appointment, of or affecting any Real or Personal Estate (other than and except Charges and Directions for the Payment of any Debt or Debts), shall be thereby given or made, such Devise, Legacy, Estate, Interest, Gift, or Appointment shall, so far only as concerns such Person attesting the Execution of such Will, or the Wife or Husband of such Person, or any person claiming under such Person or Wife or Husband, be utterly null and void, and such Person so attesting shall be admitted as a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof, notwithstanding such Devise, Legacy, Estate, Interest, Gift, or Appointment mentioned in such Will.

XVI. And be it further enacted, That in case by any Will any Creditor at-

#### Appendix.

shall be in Writing, and signed by the Testator in the Presence of Two Witnesses at one Time.

Appointments by Will to be executed like other Wills, and to be valid, although other required Solemnities are not observed.

Soldiers' and Mariners' Wills excepted.

Act not to affect certain Provisions of 11 Geo. 4 & 1 Will 4, c. 20, with respect to Wills of Petty Officers and Seamen and Marines.

Publication not to be requisite.

Will not to be void on account of incompetency of attesting Witness.

Gifts to an attesting Witness to be void.

- Appendix.** Real or Personal Estate shall be charged with any Debt or Debts, and any Creditor, or the Wife or Husband of any Creditor, whose Debt is so charged, shall attest the Execution of such Will, such creditor notwithstanding such Charge shall be admitted a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof.
- testing to be admitted a Witness.** XVII. And be it further enacted, That no Person shall, on account of his being an Executor of a Will, be incompetent to be admitted a Witness to prove the Execution of such Will, or a Witness to prove the Validity or Invalidity thereof.
- Executor to be admitted a Witness.** XVIII. And be it further enacted, That every Will made by a man or Woman shall be revoked by his or her Marriage (except a Will made in exercise of a Power of Appointment, when the Real or Personal Estate thereby appointed would not in default of such Appointment pass to his or her Heir, Customary Heir, Executor, or Administrator, or the Person entitled as his or her next of Kin, under the Statute of Distributions).
- Will to be revoked by Marriage.** XIX. And be it further enacted, That no Will shall be revoked by any Presumption of an Intention on the Ground of an Alteration in Circumstances.
- No Will to be revoked by Presumption.** XX. And be it further enacted, That no Will or Codicil, or any Part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the Testator, or by some Person in his Presence and by his Direction, with the intention of revoking the same.
- No Will to be revoked but by another Will or Codicil, or by a Writing executed like a Will, or by Destruction.** XXI. And be it further enacted, That no Obliteration, Interlineation, or other Alteration made in any Will after the Execution thereof shall be valid or have any Effect, except so far as the Words or Effect of the Will before such Alteration shall not be apparent, unless such Alteration shall be executed in like Manner as herein-before is required for the Execution of the Will; but the Will, with such Alteration as Part thereof, shall be deemed to be duly executed if the Signature of the Testator and the Subscription of the Witnesses be made in the Margin or on some other Part of the Will opposite or near to such Alteration, or at the Foot or End of or opposite to a Memorandum referring to such Alteration, and written at the End or some other Part of the Will.
- No alteration in a Will shall have any Effect unless executed as a Will.** XXII. And be it further enacted, That no Will or Codicil, or any Part thereof, which shall be in any Manner revoked, shall be revived otherwise than by the Re-execution thereof, or by a Codicil executed in manner herein-before required, and showing an Intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such Revival shall not extend to so much thereof as shall have been revoked before the Revocation of the whole thereof, unless an Intention to the contrary shall be shown.
- No Will revoked to be revived otherwise than by Re-execution or a Codicil to revive it.** XXIII. And be it further enacted, That no Conveyance or other Act made or done subsequently to the Execution of a Will of or relating to any Real or Personal Estate therein comprised, except an
- A Devise not to be rendered**

Act by which such Will shall be revoked as aforesaid, shall prevent the Operation of the Will with respect to such Estate or Interest in such Real or Personal Estate as the Testator shall have power to dispose of by Will at the Time of his Death.

XXIV. And be it further enacted, That every Will shall be construed, with reference to the Real Estate and Personal Estate comprised in it, to speak and take effect as if it had been executed immediately before the Death of the Testator, unless a contrary Intention shall appear by the Will.

XXV. And be it further enacted, That, unless a contrary Intention shall appear by the Will, such Real Estate or Interest therein as shall be comprised or intended to be comprised in any Devise in such Will contained, which shall fail or be void by reason of the Death of the Devisee in the lifetime of the Testator, or by reason of such Devise being contrary to Law or otherwise incapable of taking effect, shall be included in the Residuary Devise (if any) contained in such Will.

XXVI. And be it further enacted, That a Devise of the Land of the Testator, or of the Land of the Testator in any Place or in the Occupation of any Person mentioned in his Will, or otherwise described in a general Manner, and any other general Devise which would describe a Customary, Copyhold, or Leasehold Estate if the Testator had no Freehold Estate which could be described by it, shall be construed to include the Customary, Copyhold, and Leasehold Estates of the Testator, or his Customary, Copyhold, and Leasehold Estates, or any of them, to which such Description shall extend, as the Case may be, as well as Freehold Estates, unless a contrary Intention shall appear by the Will.

XXVII. And be it further enacted, That a general Devise of the Real Estate of the Testator, or of the Real Estate of the Testator in any Place or in the occupation of any person mentioned in his Will, or otherwise described in a general Manner, shall be construed to include any Real Estate, or any Real Estate to which such Description shall extend (as the case may be), which he may have Power to appoint in any manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will; and in like Manner a Bequest of the Personal Estate of the Testator, or any Bequest of Personal Property described in a general Manner, shall be construed to include any Personal Estate, or any Personal Estate to which such Description shall extend (as the Case may be), which he may have power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will.

XXVIII. And be it further enacted, That where any Real Estate shall be devised to any Person without any words of Limitation, such Devise shall be construed to pass the Fee Simple, or other the whole Estate or Interest which the Testator had Power to dispose of by Will in such Real Estate, unless a contrary Intention shall appear by the Will.

XXIX. And be it further enacted, That in any devise or Bequest of Real or Personal Estate the Words "die without Issue," or "die without leaving Issue," or "have no Issue," or any other Words which may import either a Want or Failure of Issue of any Person in his

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inoperative by any subsequent Conveyance or Act.

A Will shall be construed to speak from the Death of the Testator.

A Residuary Devise shall include Estates comprised in lapsed and void Devises.

A general Devise of the Testator's Lands shall include Copyhold and Leasehold as well as Freehold Lands.

A general Gift shall include Estates over which the Testator has a general Power of Appointment.

A Devise without any Words of Limitation shall be construed to pass the Fee.

The Words "die without Issue," or "die without leaving Issue,"

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shall be construed to mean die without Issue living at the Death.

No Devise to Trustees or Executors, except for a Term or a Presentation to a Church shall pass a Chattel Interest.

Trustees under an unlimited Devise, where the Trust may endure beyond the Life of a Person beneficially entitled for Life, to take the Fee.

Devises of Estates Tail shall not lapse.

Gifts to Children or other Issue who leave Issue living at the Testator's Death shall not lapse.

Act not to extend to Wills made before 1838 nor to Estates

Lifetime, or at the Time of his Death, or an indefinite Failure of his Issue, shall be construed to mean a Want or Failure of Issue in the Lifetime or at the Time of the Death of such Person, and not an indefinite Failure of his Issue, unless a contrary Intention shall appear by the Will, by reason of such Person having a Prior Estate Tail or of a preceding Gift, being (without any Implication arising from such Words), a Limitation of an Estate Tail to such Person or Issue, or otherwise: Provided, that this Act shall not extend to Cases where such Words as aforesaid import if no Issue described in a preceding Gift shall be born, or if there shall be no Issue who shall live to attain the Age or otherwise answer the Description required for obtaining a vested Estate by a preceding Gift to such Issue.

XXX. And be it further enacted, That where any Real Estate (other than or not being a Presentation to a Church) shall be devised to any Trustee or Executor, such devise shall be construed to pass the Fee Simple or other the whole Estate or Interest which the Testator had power to dispose of by Will in such Real Estate, unless a definite Term of Years, absolute or determinable, or an Estate of Freehold, shall thereby be given to him expressly or by Implication.

XXXI. And be it further enacted, That where any Real Estate shall be devised to a Trustee, without any express Limitation of the Estate to be taken by such Trustee, and the beneficial Interest in such Real Estate, or in the surplus Rents and Profits thereof, shall not be given to any Person for Life, or such beneficial Interest shall be given to any Person for Life, but the Purposes of the Trust may continue beyond the Life of such Person, such Devise shall be construed to vest in such Trustee the Fee Simple, or other the whole legal Estate which the Testator had Power to dispose of by Will in such Real Estate, and not an Estate determinable when the Purposes of the Trust shall be satisfied.

XXXII. And be it further enacted, That where any Person to whom any Real Estate shall be devised for an Estate Tail or an Estate in quasi Entail shall die in the lifetime of the Testator leaving Issue who would be inheritable under such Entail, and any such Issue shall be living at the Time of the Death of the Testator, such Devise shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

XXXIII. And be it further enacted, That where any Person being a Child or other Issue of the Testator to whom any Real or Personal Estate shall be devised or bequeathed for any Estate or Interest not determinable at or before the Death of such Person shall die in the Lifetime of the Testator leaving Issue, and any such Issue of such Person shall be living at the Time of the Death of the Testator, such Devise or Bequest shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

XXXIV. And be it further enacted, That this Act shall not extend to any Will made before the First Day of *January*, One thousand eight hundred and thirty-eight, and that every Will re-executed or republished, or revived by any Codicil, shall for the Purposes of this

Act be deemed to have been made at the Time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any Estate *pur autre vie* of any Person who shall die before the First Day of *January*, One thousand eight hundred and thirty-eight.

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*pur autre vie*  
of Persons  
who die  
before 1838.

XXXV. And be it further enacted, that this Act shall not extend to *Scotland*.

Act not to  
extend to  
*Scotland*.

XXXVI. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present Session of Parliament.

Act may be  
altered this  
Session.

**DUTIES ON PROBATES OF WILLS AND LETTERS OF ADMINISTRATION UNDER THE CUSTOMS AND INLAND REVENUE ACT, 1881 (44 VICT. C. 12), SEC. 26, ET SEQ.**

**Appendix.**

By section 27—

Where the estate and effects for or in respect of which the probate or letters of administration is or are to be granted exclusive of trust property shall be above £100 and not above £500 . . . . .

At the rate of £1 for every £50, and for every fractional part of £50 over any multiple of £50.

Where the estate and effects shall be above £500 and not above £1000 . . . . .

At the rate of £1 5s. for every £50, and for any fractional part of £50 over any multiple of £50.

Where the estate and effects shall be above £1000 . . . . .

At the rate of £3 for every £100, and for any fractional part of £100 over any multiple of £100.

By section 28, for the purposes of the duty a deduction is allowed of funeral expenses and debts, not including voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of the deceased, and debts in respect whereof any real estate may be primarily liable or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person.

The funeral expenses to be deducted must be reasonable funeral expenses according to law.

By section 33, where the whole personal estate and effects of any person dying after the 1st June, 1881 (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed £300, the person applying for probate or letters of administration may deliver a notice setting forth the particulars of the estate

and effects, and deposit the sum of 15 shillings for fees of Court and expenses; and also, in case the estate exceeds £100, the further sum of 30 shillings for stamp duty. Appendix.

By section 36, the payment of the sum of 30 shillings under section 33 is to be in full satisfaction of any claim to legacy duty or succession duty.

By section 41, any legacy, residue or share of residue, payable out of or consisting of any estate or effects according to the value whereof duty has been paid under the Act, is relieved from the 1 per cent. duty imposed by 55 Geo. III. c. 184. And in respect of any succession to property according to the value whereof duty has been paid under the Act, the duty of 1 per cent. imposed by the Succession Duty Act, 1853, is not payable. See *In re Haygarth's Trusts*, 22 Ch. D. 545.

By section 42, legacy duty is payable on legacies under £20, unless the whole estate is less than £100, when no legacy duty is payable on any part of the estate.

By the Act 39 Geo. III. c. 73, no legacy consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the Society of Serjeants' Inn, or any of the Inns of Court or Chancery, or any endowed school, in order to be kept and preserved by such body corporate, society or school, and not for the purposes of sale, is to be liable to any duty imposed on legacies by any law then in force.

## STAMP DUTIES (PROBATES, LEGACIES AND SUCCESSION).

TABLES for Calculating the LEGACY AND SUCCESSION DUTIES from £100 to £1 (a).

	£10		£6		£5		£3		£1 pr. ct.		£10		£6		£5		£3		£1 p. c.
£	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.	s.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
100	10	0 0	6	0 0	5	0 0	3	0 0	1	0 0	13	1 3½	9½	7½	4½	1½	1½	1½	1½
50	5	0 0	3	0 0	2	10 0	1	10 0	10	0 0	12	1 2½	8½	7	4½	1½	1½	1½	1½
25	2	10 0	1	10 0	1	5 0	15	0	5	0 0	11	1 1	7½	6½	3½	1½	1½	1½	1½
10	1	0 0	12	0	10	0	6	0	2	0 0	10	1 0	7	6	3½	1	1	1	1
5	10	0	6	0	5	0	3	0	1	0 0	9	10½	6½	5½	3	1	1	1	1
4	8	0	4	9½	4	0	2	4½	9½		8	9½	5½	4½	2½	1	1	1	1
3	6	0	3	7	3	0	1	9½	7		7	8½	5	4	2½	1	1	1	1
2	4	0	2	4½	2	0	1	2½	4½		6	7	4½	3½	2	1	1	1	1
1	2	0	1	1½	1	0	7	2½	2½		5	6	3½	3	1½	1	1	1	1
19s.	1	10½	1	1½	11½		6½	2½	2½		4	4½	2½	2½	1½	1	1	1	1
18	1	9½	1	0½	10½		6½	2	2		3	3½	2	1½	1	1	1	1	1
17	1	8½	1	0	10		6	2	2		2	2½	1½	1	1	1	1	1	1
16	1	7	11½		9½		5½	1½	1½		1	1	1	1	1	1	1	1	1
15	1	6	10½		9		5½	1½	1½		6d.	1	1	1	1	1	1	1	1
14	1	4½	10		8½		5	1½	1½		3	1	1	1	1	1	1	1	1

## RATES of LEGACY AND SUCCESSION DUTIES.

(55 Geo. III. c. 184, and 16 &amp; 17 Vict. c. 51.)

Description of the Residuary Legatee, or next of Kin, to be in the following Words of the Act.	On Real or Personal Estate, if the Deceased died after the 5th April, 1865.
To Children of the deceased and their Descendants—or to the Father or Mother, or any lineal ancestor of the deceased.	£1 per cent.
To Brothers and Sisters of the deceased, and their Descendants.	3 "
To Brothers and Sisters of the Father or Mother of the deceased, or their Descendants.	5 "
To Brothers and Sisters of a Grandfather or Grandmother of the deceased, and their Descendants.	6 "
To any person in any other degree of collateral consanguinity—or to Strangers in blood to the deceased.	10 "
The Husband or Wife of any relative pays the same rate of duty as that to which the relative would be liable, 16 & 17 Vict. c. 51, s. 11.	

(a) The duties on sums varying between those stated in the first five lines of the Table can, of course, be ascertained by adding the different proportions together, viz., £50, £10, £5, for £65—or by subtraction, as—for £95, £5 from £100.

See the foregoing Table of these duties.

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